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# Changing the Marriage Equation

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## CHANGING THE MARRIAGE EQUATION

DEBORAH A. WIDISS\*

### ABSTRACT

*This Article brings together legal, historical, and social science research to analyze how couples allocate income-producing and domestic responsibilities. It develops a framework—what I call the “marriage equation”—that shows how sex-based classifications, (non-sex-specific) substantive marriage law, and gender norms interrelate to shape these choices. The marriage equation has changed over time, both reflecting and engendering societal preferences regarding the optimal allocation of breadwinning and caretaking responsibilities.*

*Until fifty years ago, sex-based classifications in family and employment law aligned with gender norms to enforce an ideology of separate spheres for men and women. The groundbreaking sex discrimination cases of the 1970s ended legal distinctions between the duties of husbands and wives but left largely in place both gender norms*

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\* Associate Professor, Indiana University Maurer School of Law. I am grateful to Ann Cammett, Mary Anne Case, Cary Franklin, Michael Grossberg, Clare Huntington, Dawn Johnsen, Courtney Joslin, Alicia Brokars Kelly, Suzanne Kim, Terry Maroney, Stephanie McMahon, Melissa Murray, Doug NeJaime, Aviva Orenstein, Charlotte Patterson, Brian Powell, Kimberly Richman, Ryan Scott, Suzanna Walters, and Sean Williams for conversations about the ideas that became this Article and for insightful suggestions on earlier drafts. Additionally, I thank participants in the Association of American Law Schools Workshop on Women Rethinking Equality; Law and Society Association Annual Meeting; Emerging Family Law Scholars Conference; University of Cincinnati Faculty Workshop; Vanderbilt Law School Faculty Workshop; Colloquium on Current Scholarship in Labor and Employment Law; Southeastern Association of Law Schools Conference; Big Ten Untenured Conference; and the Indiana University Law, Society, and Culture Association for their helpful comments. Thanks too to Dean Lauren Robel and the Indiana University Maurer School of Law Summer Research Stipend Program for support of this project and to the editors of the Washington University Law Review for their extremely conscientious work.

*and substantive rights within marriage, tax, and benefits law that encourage specialization into breadwinning and caregiving roles. Thus, contrary to popular conception, the modern marriage equation does not actually promote equal sharing of these responsibilities. Rather, it still encourages specialization, although the law is now formally agnostic about which spouse plays which role. The vast majority of different-sex couples still follow to some extent traditional gender roles. A body of emerging social science research suggests that same-sex couples typically allocate these responsibilities more equally than different-sex couples. But claims that same-sex couples may therefore serve as a model for different-sex couples improperly ignore that the data sets in these studies predate legal marriage for same-sex couples. By permitting disaggregation of the marriage equation to gauge more accurately the relative significance of sex, gender norms, and substantive marriage law, the new reality of same-sex marriage can serve as a natural experiment that should inform both study design and policy reform.*

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## INTRODUCTION

*“It never ceases to amaze me how many people will say to us, ‘So, who’s the woman, and who’s the man, in your marriage?’”*

—Jason Shumaker, husband to Paul McLoughlin II<sup>1</sup>

Traditionally, substantive marriage law aligned sex-based classifications with gender norms. They were collectively coherent and mutually reinforcing, albeit in a way that subordinated women to men. A husband was responsible for financially supporting his wife and a wife owed domestic services to her husband. The groundbreaking sex discrimination cases of the 1970s required legislatures to strip away virtually all of the sex-based classifications within marriage law other than the basic requirement that marriage must be between a man and a woman.<sup>2</sup> These decisions have a separate legacy that is often overlooked: although they prohibited most legal distinctions between the sexes, they left in place an architecture of marriage, tax, and benefits law that encourages specialization into breadwinner and caregiver roles.<sup>3</sup> Gender norms have also changed far less than feminist reformers expected. Despite more than thirty years of formal equality, the vast majority of different-sex marriages still follow to some extent traditional gender roles.<sup>4</sup> Contemporary litigation over marriage rights for same-sex couples—that is, challenges to the last significant sex-based classification within marriage law—once again reconfigures marriage. The new reality of same-sex married couples does not just advance equality for gays and lesbians; it can also offer a fresh perspective on efforts to achieve equality *within* marriage for (different- and same-sex) couples.

Sex-based classifications within marriage law, gender norms, and non-sex-specific substantive laws of marriage collectively form what I call a “marriage equation” that shapes how individual couples allocate responsibility for breadwinning and for caretaking. This Article explores the connections among these factors and the tensions that can arise when

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1. Benoit Denizet-Lewis, *Young Gay Rites*, N.Y. TIMES MAG., Apr. 27, 2008, at 28, 35.

2. See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979) (holding ban on men receiving alimony unconstitutional); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (holding ban on widowers receiving social security benefits unconstitutional).

3. See *infra* Part II.B.

4. See *infra* Part II.C.

they pull in different directions.<sup>5</sup> All three factors of the marriage equation both reflect and engender societal preferences regarding the “optimal” division of income-producing and domestic responsibilities. Thus, the elements of the marriage equation can be used to encourage a particular allocation of these functions, anywhere along a spectrum bounded at one end by equal sharing by both spouses of caretaking and breadwinning responsibilities and at the other by total specialization into separate roles. Additionally, and importantly, the interrelationship of these factors is essential in determining whether a normative preference for specialization, as applied to different-sex couples, is specific or agnostic as to the sex of the spouse who plays each role.

This Article traces the evolution of the marriage equation over the past fifty years to show how its factors interrelate in the choices individual couples make and in the development of public policy. It demonstrates how assumed or presumed connections between sex-based classifications and gender norms shape legislative and judicial responses to debates over marriage policy. The analysis in this Article helps show why reform of sex-based classifications alone can have little (or arguably even harmful) effect when not accompanied by corresponding changes in substantive marriage responsibilities and gender norms.<sup>6</sup> In other words, the marriage equation framework serves as a diagnostic tool that helps analyze successes and limits of past reforms and that identifies crucial questions that should shape research and policy design in the future.

The framework also helps explain why and how conversations regarding proposed recognition of same-sex relationships often focus on the supposed effect that such recognition would have on gender norms for different-sex couples. During the 1970s, Phyllis Schlafly and other opponents of the Equal Rights Amendment successfully used the specter of gay marriage as one of the potent arguments against the amendment.<sup>7</sup> Likewise, in today’s debate, significant opposition to permitting same-sex couples to marry rests not simply on a definitional understanding of marriage as a union of man and woman but on a “thicker” gendered conception of marriage as ideally between a provider husband and a homemaker wife. Some critics explicitly call for a return to state-sanctioned gender roles within marriage; others, who do not go that far,

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5. This framework is sketched out in Part I. Part II and Part III use it to analyze decision-making by and policy debates regarding different-sex and same-sex couples respectively.

6. See *infra* Part II.B–D.

7. See PHYLLIS SCHLAFLY, *THE POWER OF THE POSITIVE WOMAN* 89–95 (1977); *infra* Part III.A.1.

worry that state recognition of same-sex marriages<sup>8</sup> undermines society's gendered expectations of spouses, particularly men's responsibility to their wives and children, or hurts children by denying them gendered role models within the home.<sup>9</sup> Courts have proven surprisingly receptive to such arguments, at least when evaluating legislation under the deferential "rational basis" standard.<sup>10</sup> I have argued previously—as have others—that the pervasiveness of sex stereotypes in the articulated rationales for denying same-sex couples access to marriage should be grounds for holding such laws to be unconstitutional sex discrimination.<sup>11</sup>

This Article turns the question around, asking not whether sex equality doctrine developed in the context of different-sex marriages can help achieve marriage equality for same-sex couples, but rather how marriage equality for same-sex couples can inform larger questions of sex equality. Although contemporary proponents of expanded marriage rights shy away from making such claims,<sup>12</sup> some earlier advocates celebrated the possibility that same-sex marriage could destabilize gendered understandings of marriage.<sup>13</sup> Other commentators and advocates worried about the potential "co-optive" effect of traditional marriage roles on same-sex relationships.<sup>14</sup> The current moment transforms these arguments

8. The term "same-sex marriage" implies that the status is in some significant way distinct from (different-sex) marriage. I believe this is incorrect. This Article examines how the reality of same-sex married couples can change our understanding of marriage generally. However, since phrases such as "equal access to marriage for same-sex couples" make very clunky sentences, I use the common term "same-sex marriage." Cf. M. V. LEE BADGETT, *WHEN GAY PEOPLE GET MARRIED: WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE* 14 (2009) (making a similar point regarding terminology).

9. See *infra* Part III.A.1.

10. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) ("[T]he Legislature could rationally proceed on the common-sense premise that children will do best with a mother and father in the home."); *Andersen v. King Cnty.*, 138 P.3d 963, 983 (Wash. 2006) (plurality opinion) ("[T]he legislature was entitled to believe that providing that only opposite-sex couples may marry will encourage procreation and child-rearing in a 'traditional' nuclear family where children tend to thrive.").

11. See, e.g., Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461 (2007); see also Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97 (2005); Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519 (2001).

12. See *infra* text accompanying notes 267–68.

13. See, e.g., Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9 (1991); Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK NAT'L GAY & LESBIAN Q., Fall 1989, at 9, *reprinted with some modifications in* LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES 13 (Suzanne Sherman ed., 1992).

14. See, e.g., Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK NAT'L GAY & LESBIAN Q., Fall 1989, at 14, *reprinted with some modifications in* LESBIAN AND GAY

from theoretical debates into real questions being worked out by families across the country.<sup>15</sup> Same-sex couples are permitted to marry or form legally recognized civil unions or domestic partnerships in a rapidly growing number of states and localities.<sup>16</sup> The questions are therefore newly salient.<sup>17</sup>

A burgeoning body of social science suggests that same-sex couples divide responsibilities for income-producing work and domestic care more equally and more equitably than different-sex couples.<sup>18</sup> Some social scientists and popular writers have accordingly claimed that the growing acceptance of same-sex marriage can serve as a model for different-sex couples struggling to share responsibilities for work and for home care.<sup>19</sup>

MARRIAGE, PRIVATE COMMITMENTS, PUBLIC CEREMONIES 20 (Suzanne Sherman ed., 1992); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535 (1993).

15. See Press Release, Williams Inst., New Estimate of 50,000 to 80,000 Married Same-Sex Couples in the U.S. (Feb. 24, 2011), available at <http://williamsinstitute.law.ucla.edu/press/press-releases/new-estimate-of-50000-to-80000-married-same-sex-couples-in-the-us> (estimating in February 2011, prior to New York legalizing same-sex marriage, that 50,000 same-sex couples had married in this country, an additional 30,000 same-sex couples living in America had married in other countries, and that an additional 85,000 same-sex couples had formed civil unions or domestic partnerships in this country).

16. As of March 2012, Connecticut, the District of Columbia, Iowa, Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington have legalized same-sex marriage, and California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, and Rhode Island have state laws providing the equivalent of spousal rights to same-sex couples within the state. See *Marriage Equality & Other Relationship Recognition Laws*, HUMAN RIGHTS CAMPAIGN (July 6, 2011), [http://www.hrc.org/documents/Relationship\\_Recognition\\_Laws\\_Map.pdf](http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf); 2012 Wash. Ch. 3, 2011 Wa. S.B. 6239 (effective June 7, 2012); 2012 Md. Ch. 2, 2012 Md. H.B. 438 (effective Jan. 1, 2013, or upon resolution of potential disputes relating to any referendums on the Act).

17. A few other legal commentators have explored aspects of the interplay between marriage rights for same-sex couples and gender roles within different-sex marriages that I discuss. See Katharine K. Baker, *The Stories of Marriage*, 12 J.L. & FAM. STUD. 1 (2010) (articulating multiple meanings for "marriage" and the extent to which it remains deeply gendered); Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199 (2010) (exploring historical connection between efforts to achieve equality within different-sex marriages and movement to legalize same-sex marriage); Jane S. Schacter, *The Other Same-Sex Marriage Debate*, 84 CHI.-KENT L. REV. 379, 400 (2009) (using the Stoddard/Ettelbrick debate to suggest directions for future empirical research). Additionally, Nancy Polikoff remains an outspoken critic of marriage as an objective for same-sex couples, in part because of its patriarchal past and the extent to which it continues to encourage specialization. See NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008). I share some of her concerns but am more hopeful that the new reality of marriage rights for same-sex couples may spur positive reforms for same- and different-sex couples.

18. See *infra* Part III.B.

19. See, e.g., Sondra E. Solomon et al., *Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings*, 52 SEX ROLES 561, 572 (2005) ("[S]ame-sex couples are a model for ways of equalizing the division of housework."); Lisa Belkin, *The Way We Live Now: What's Good for the Kids*, N.Y. TIMES MAG., Nov. 8, 2009, at MM9, available at <http://www.nytimes.com/2009/11/08/magazine/08fob-wwln-t.html> ("Heterosexual

But such claims consistently overlook a key factor: the studies that exist today use data sets that predate legal *marriage* for same-sex couples. This is significant. Numerous aspects of marriage law, and related benefits laws, continue to encourage specialization into breadwinner and caretaker roles; this is what I call the “gender” of marriage.<sup>20</sup> Within an existing marriage, a wide range of policies—including tax, social security, and welfare benefits—reward married couples that have a significant disparity in their individual incomes, and access to a spouse’s employer-sponsored healthcare often enables one spouse to exit the paid work force. If a marriage dissolves, divorce law, while far from a comprehensive safety net, provides protection to a dependent spouse by awarding that spouse a share of property and income accumulated during the marriage and, in some instances, maintenance or alimony payments post-divorce. These substantive legal rights work in tandem with societal understandings of what “marriage” means and the personal commitment that spouses make to each other. In other words, to hearken back to the quotation that opened this Article, the substantive law of marriage and related benefits, while formally sex-neutral, may nonetheless encourage spouses to take on distinct roles of “woman” and “man” even within a same-sex relationship.

But the marriage equation for same-sex couples is different than that for different-sex couples. For different-sex couples, gender norms work together with substantive marriage law to encourage specialization. For same-sex couples, by contrast, a decision to specialize into breadwinning or caregiving roles means that one member of the couple, at least, is going “against” gender norms. Same-sex marriage can thus serve as a natural experiment to help tease out the relative significance of the law of marriage, as opposed to gender, in how couples allocate responsibilities.

It is not (yet) possible to fully compare same-sex married couples to different-sex married couples. The federal Defense of Marriage Act (DOMA) denies same-sex couples all of the federal benefits of marriage.<sup>21</sup> Additionally, same-sex couples in several states may form civil unions but not actual marriages. Pending court challenges and legislative reform efforts suggest that the current variability may be time limited.<sup>22</sup> As I have

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couples might want to pay attention to the[] results [in such studies]”); Tara Parker-Pope, *Gay Unions Shed Light on Gender in Marriage*, N.Y. TIMES, June 10, 2008, at F1 (“[S]ame-sex couples have a great deal to teach everyone else about marriage and relationships.”).

20. See *infra* Part II.B.

21. See 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

22. See, e.g., *Perry v. Brown*, No. 10-16696, 11-16577, 2012 U.S. App. LEXIS 2328 (9th Cir. Feb. 7, 2012) (holding California’s constitutional amendment prohibiting same-sex marriage unconstitutional); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010) (holding



written elsewhere, as a matter of constitutional law and fundamental fairness, I believe that same-sex couples in any state should have the freedom to marry.<sup>23</sup> That said, the current patchwork offers the opportunity to design qualitative and quantitative studies that assess the relative significance of state versus federal benefits of marriage and of the various legal frameworks employed by states. Although it is impossible to predict precisely what the result of such studies would be, they could offer a fresh perspective on long-standing debates over the role that law plays in the choices families make regarding division of breadwinning and caregiving responsibilities.

In exploring the potential of same-sex marriage to inform other aspects of marriage policy, I wish to set to the side debates over *whether* marriage is a normatively desirable goal for gays and lesbians in particular or for families in general. In recent years, there has been a renewed discussion among progressive advocates and commentators about potential costs of the marriage equality movement.<sup>24</sup> Some argue that marriage litigation diverts money and energy from other advocacy priorities and has inspired a backlash.<sup>25</sup> Others argue that expansion of marriage rights (and particularly the extent to which advocates for same-sex couples have valorized aspects of traditional marriage)<sup>26</sup> may undermine efforts to

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DOMA's limitation of "marriage" or "spouse" to one man and one woman to violate the Due Process Clause of the Fifth Amendment), *appeal pending*; *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (holding denial of federal benefits under DOMA unconstitutional), *appeal pending*; Respect for Marriage Act, H.R. 1116, 112th Cong. (2011), S. 598 112th Cong. (2011) (bills proposing repeal of DOMA).

23. See generally Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375 (2010) (arguing equal access to civil marriage is constitutionally compelled by the fundamental rights branch of equal protection law unless states stop performing civil marriages entirely); Widiss et al., *supra* note 11 (arguing unconstitutional sex stereotypes underlie the denial of marriage rights to same-sex couples).

24. For thoughtful accounts of the progressive critiques on the marriage equality movement, see Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37, 42–47 (2011) (discussing "marriage skepticism" grounded in concerns regarding gendered history of marriage, privileging state regulation of intimacy, and diverting energy from achieving state recognition of diverse family forms); Schacter, *supra* note 17, at 389–93 (identifying similar themes in Paula Ettelbrick's initial critique of campaign to seek marriage rights); Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567 (2009) (tracing historical development of positions pro- and con-marriage initially articulated by Tom Stoddard and Paula Ettelbrick and concluding the strategies complement each other well).

25. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 339–419 (2d ed. 2008) (arguing that backlash to litigation seeking same-sex marriage rights led to widespread enactment of federal and state DOMAs, contributed to the victory of George W. Bush, and failed to increase substantially public support for same-sex marriage). But see Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010) (discussing such critiques before ultimately arguing they are unwarranted).

26. See POLIKOFF, *supra* note 17, at 98–103.

achieve recognition of diverse family structures,<sup>27</sup> protection of individual liberties both within and outside of legally recognized relationships,<sup>28</sup> or a more robust government commitment to meet basic needs such as access to health care or financial support for children.<sup>29</sup> I have considerable sympathy for some of these critiques. Nonetheless, I believe that so long as civil marriage exists, it should be available to gays and lesbians.<sup>30</sup> Additionally, for better or worse, marriage *is* currently the primary means of structuring and recognizing family relationships. Tens of thousands of same-sex couples are now married, and this reality offers the opportunity to rethink aspects of marriage law more generally.

This Article proceeds as follows. Part I introduces the marriage equation framework and its traditional alignment. Applying this framework, Part II shows that simply removing sex-based classifications from marriage law, as required by constitutional doctrine developed during the 1970s, has had limited effects in changing how different-sex couples apportion responsibility for breadwinning and caregiving. It posits that the prevalence and persistence of gendered divisions of responsibilities is due both to social norms and to substantive provisions of marriage and related benefits law that continue to encourage specialization. Part III explores a body of sociological research that substantiates that same-sex couples share income-producing and domestic responsibilities more equally than different-sex couples but argues that new studies should specifically explore the effects of marriage on couples' decision-making. The Conclusion briefly considers how the framework can inform efforts to achieve equality within marriage for all couples.

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27. See, e.g., *id.* at 123–45 (advocating recognition of families based on commitments to support or autonomous choices rather than marital default); cf. Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (arguing family law should recognize role of non-parental caregivers); Laura A. Rosenbury, *Friends With Benefits?*, 106 MICH. L. REV. 189 (2007) (arguing law should recognize care provided and received by friends).

28. See, e.g., Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004) (criticizing pursuit of marriage equality as limiting freedom of gays and lesbians).

29. See, e.g., Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL'Y & L. 167 (2000) (building on Fineman's proposal of replacing marriage with a Mother-Child dyad to argue against the gay and lesbian advocacy movement's focus on marriage); see also MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH-CENTURY TRAGEDIES* (1995) [hereinafter FINEMAN, *THE NEUTERED MOTHER*].

30. See sources cited *supra* note 23.

## I. INTERRELATIONSHIP OF SEX, GENDER, AND THE LAW OF MARRIAGE

### A. *The Marriage Equation*

Marriage is a legal structure that traditionally has been understood to simultaneously regulate the family and provide significant social and communal benefits.<sup>31</sup> The state sets rules regarding who may enter (civil) marriages, whether and how marriages may be dissolved, and what responsibilities spouses owe to each other—and to their children—during and after a marriage. Many of these rules seek to ensure children will receive physical care, education, and financial support, and additionally that familial caregivers for children receive financial support.<sup>32</sup> But law is only part of the story. Marriage, more than most other legal relationships, has long been defined as well by societal and cultural expectations and religious doctrine, as well as by individual preferences.<sup>33</sup> And, since many societies have traditionally limited marriage to the union of one man with one woman, regulation of marriage is intimately intertwined with expectations regarding appropriate male and female roles.<sup>34</sup>

When married couples make decisions regarding how they will share responsibility for income-producing work and domestic obligations, their choices will generally fall on a spectrum bounded at one end by equal sharing of both responsibilities and at the other by complete specialization into breadwinning and domestic roles. Even if both spouses participate in the labor market, and even if they rely on paid caregivers or other domestic workers to support this work, couples must determine what extent of domestic obligations to “out-source,” which spouse will perform remaining domestic work, and which spouse will modify a work schedule

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31. See, e.g., Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same Sex—or Not at All?*, 34 FAM. L.Q. 271, 276–77 (2000) (identifying social functions of marriage as providing “efficient and orderly setting” for sexual activity and procreation, social companionship and psychological support, economic insurance against adversity, and support for caregiving of dependent children and elderly parents).

32. For a discussion of these issues, and a proposal to move away from marriage as the primary means of providing for children, see FINEMAN, *THE NEUTERED MOTHER*, *supra* note 29.

33. See generally, e.g., Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1 (2009).

34. For a careful review of several historical examples of same-sex “marriages,” see Polikoff, *supra* note 14, at 1538–40. Polikoff argues that most of these marriages imported hierarchies that were similar to the traditional male-female hierarchy within different-sex marriages. See *id.* At points in history, polygamy (a marriage of a husband with more than one wife) has been common and it remains widespread in some parts of the world; polyandry (a marriage of a wife with more than one husband) has also existed but has been far less common. See ABA Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 349–50 (2004).

when necessary to meet unexpected domestic needs. For many couples, this negotiation occurs any time a child is too sick to go to school or any time a major appliance breaks down. Couples who choose to specialize completely into separate breadwinning and caregiving roles, or to prioritize labor market participation by one spouse and domestic work by the other spouse, must also determine which spouse will take on which set of responsibilities. For any given couple, the choices may shift over time, or even vary dramatically on a daily or weekly basis. But their choices are shaped, and sometimes constrained, by societal gender norms and by substantive marriage law, including any *sex-specific* obligations that are imposed on husbands or on wives and *non-sex-specific* structures that can encourage specialization or, conversely, equal sharing of domestic and income-producing responsibilities.<sup>35</sup> (Single individuals, and particularly single parents, face different challenges, in that they must figure out how to meet both sets of needs largely on their own. The choices faced by cohabiting couples are often similar to those of married couples, but, as discussed more fully below, the lack of a formal, legally binding relationship may play a significant role in how they are resolved.)

These three factors—sex-based classifications within marriage law, (non-sex-specific) substantive marriage law, and gender norms—collectively make up what I call the “marriage equation.” Although these factors are logically distinct, they interrelate. Any individual couple’s choices will be shaped by all three factors, the extent to which the factors reinforce or are in tension with each other, and the couple’s assessment of each factor’s importance. The distinct factors of the marriage equation also interrelate in shaping government policy. Law expresses, reflects, and shapes societal norms.<sup>36</sup> Shifts in the law can reflect prior evolution in societal norms—that is, legal changes can “catch up” to societal changes—or legal changes can be enacted with the expectation and hope that they will help spur a change in societal norms.<sup>37</sup> But evolution of

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35. For empirical work assessing significance of gender norms and substantive provisions of marriage law, see *infra* Parts II and III.

36. See Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992) (arguing that family law expresses and engenders shared norms regarding marriage and parenthood); cf. Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 29 CARDOZO L. REV. 2133 (2007) (arguing that recent developments, including debates over same-sex marriage, challenge whether shared “core values” still exist).

37. Legislation is clearly affected by popular attitudes. Many argue that even when interpreting constitutional provisions, courts also respond to and are influenced by public opinion even if they sometimes move “in front” of popular consensus. See, e.g., Reva B. Siegel, *Constitutional Culture*,

societal norms is not monolithic; some sectors of society can feel strongly that legal change is warranted or even overdue, while other sectors resist such change vehemently. As applied to marriage law, there have been dramatic debates over time, regarding whether there is a single “optimal” division of responsibilities within marriage; if so, what it is; and further, whether and how the law should encourage or enforce it.<sup>38</sup> In this Article, I do not seek to establish that a particular allocation is normatively ideal (although I admit a preference for equal or relatively equal sharing of both breadwinning and domestic responsibilities by both spouses). Rather, I seek to articulate more clearly the interaction of the factors within the marriage equation, demonstrate how at points of transition—such as debates over the Equal Rights Amendment and marriage rights for same-sex couples—proponents and opponents of reform strategically claim and disclaim these connections, and suggest that empirical work can help disaggregate the effects of the distinct factors.

Before discussing this evolving terrain, it is important to clarify terms. In legal cases and commentary, sex and gender are often used interchangeably.<sup>39</sup> In other disciplines, however, “sex” is used to refer to men and women and the physical differences between them, and “gender” to refer to the characteristics stereotypically associated with the different sexes.<sup>40</sup> Following this distinction, I am using “sex” to refer to actual sex-based classifications within laws (that is, laws that explicitly distinguish between men and women or husbands and wives) and “gender” to refer to the different roles that men and women were traditionally expected to play within marriage (that is, men as breadwinners and women as homemakers).

It is usually clear whether a law uses an explicit sex-based classification; as a more general principle, however, the line between “sex” and “gender,” and their interaction in choices regarding labor allocation within a family, is often blurry.<sup>41</sup> For example, consider the

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*Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323 (2006).

38. See *infra* Parts II & III.

39. This is in part because former-ACLU-attorney-now-Justice Ruth Bader Ginsburg consciously chose to articulate her constitutional arguments in terms of “gender” discrimination rather than “sex” discrimination. As an advocate she believed that her audience would be more comfortable with the term “gender.” See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 10 (1995).

40. For a more comprehensive discussion of the difference, see *id.* at 10–13.

41. Some theorists, most notably Judith Butler, challenge the underlying assumption that there is a substantial reality to sexual difference distinct from gendered understandings of sex. See generally JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

choices couples make after the birth of a child. Medical experts typically estimate that women need four to eight weeks to recover physically from vaginal childbirth (and potentially longer to recover fully from a cesarean section or other complications).<sup>42</sup> Additionally, if a mother wishes to breastfeed an infant, it is optimal that she is available to nurse on demand for at least four weeks.<sup>43</sup> These biological facts push many different-sex couples to prioritize the father's income-producing work and the mother's caretaking work in the period immediately after childbirth. In other words, the mother goes on maternity leave and the father returns quickly to work. To most couples, this choice seems "obvious" or "necessary." But the salience of even such clear biological differences is shaped by gendered assumptions. To see this, imagine a mother whose work responsibilities can be completed via internet-based research, email, and phone. A mother with such a job would likely find her largely sedentary paid work far less physically taxing than taking care of a newborn baby. She could likely complete her primary work responsibilities within a week or two of the birth (even if she was not yet fully physically recovered). Even if she wanted to breastfeed the baby, she could "return" to work if she could telecommute and if someone else took responsibility during the mother's work hours for all aspects of newborn care other than nursing. This family might best meet its collective needs by having the mother return immediately to paid work and the father take leave.<sup>44</sup> But very few couples ever consider this option. Of course, many women's jobs would be less compatible with an immediate return post-childbirth than this hypothetical one. The fact that most couples choose to allocate primary responsibility for newborn care to the mother is not surprising. My point is simply to highlight that even this choice, which reflects "real" biological differences, also reflects gender.

The further one moves, temporally, from pregnancy, childbirth, and breastfeeding, the less importance biological differences between men and women will play in couples' decision-making regarding the allocation of

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42. See, e.g., *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 731 & n.4 (2003).

43. See, e.g., RUTH A. LAWRENCE & ROBERT M. LAWRENCE, *BREASTFEEDING: A GUIDE FOR THE MEDICAL PROFESSION* 471 (6th ed. 2005) (recommending women intending to breastfeed do not introduce a bottle until at least four weeks because it interferes with the mother's "milk-making rhythm" and may confuse the infant).

44. Under the federal Family and Medical Leave Act, fathers, as well as mothers, have a right to up to twelve weeks unpaid leave upon the birth or adoption of a child. See 29 U.S.C. § 2612 (2006). As discussed more fully below, employers with fewer than fifty employees are not covered under the law, and some employees may not have worked the requisite amount of hours and months to be eligible for leave. See *infra* text accompanying notes 149–50.

responsibilities. I also note that historically, biological differences and the putative need to “protect” women and their childbearing role were used as justifications for far-reaching limitations on women’s autonomy that are now clearly established as baseless.<sup>45</sup> Thus, while it may be that some differences in men’s and women’s preferences regarding the allocation of income-producing and caretaking work reflect, or are influenced by, biological or hormonal distinctions between the sexes, my analysis generally treats these preferences as “gender”-based distinctions within the marriage equation.<sup>46</sup>

“Marriage” is also a complicated term. In discussing the “marriage” factor of the “marriage equation,” I mean primarily legal marriage and the legal rights and benefits that flow from it. Procedural requirements regarding licensing, officiants, and witnesses seek to ensure that it is clear when a legal marriage has been formed, and it is generally easy to identify laws that incorporate marital status.<sup>47</sup> The analysis below demonstrates that many aspects of substantive marriage and related benefits law encourage specialization into breadwinning and caregiving roles. But “marriage” is far more than a bundle of legal rights. It is an open-ended, ideally life-long, commitment of two individuals to form a family together. Thus, even if law in no way encouraged individuals within a couple to specialize, they might nonetheless choose to develop complementary responsibilities in accordance with their personal preferences; likewise, one might express love for a spouse by subordinating individual interests for the benefit of the family or the spouse. Moreover, many individuals understand intimacy in gendered terms and construct gendered identities within such relationships that they

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45. See *Muller v. Oregon*, 208 U.S. 412, 421 (1908) (holding that physical differences between men and women and the “burdens of motherhood” justified permitting states to regulate the hours worked by women); cf. Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) (arguing that even regulations based on “real” differences between the sexes, such as pregnancy, may be so intertwined with judgments about women’s roles that they should be cognizable as sex discrimination).

46. For a recent review of social science literature exploring the complex interactions between biology and socializing forces in the development of gender roles, see Sheri A. Berenbaum et al., *A Role for Biology in Gender-Related Behavior*, 64 SEX ROLES 804 (2011). Emerging research demonstrates that behavior can itself affect hormonal differences, such as the widely publicized study that found intensive fathering lowered men’s testosterone levels. See Pam Belluck, *Fatherhood Cuts Testosterone, Study Finds, for Good of the Family*, N.Y. TIMES, Sept. 12, 2011, at A1.

47. For example, the United States General Accounting Office (renamed as the Government Accountability Office in 2004) has determined that there are 1,138 federal statutes that use marriage as a factor in determining eligibility for benefits, rights, or privileges. U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

would not accept or embrace in other contexts.<sup>48</sup> For different-sex couples, it is quite difficult, if not impossible, to disaggregate the legal from personal, symbolic, and social understandings of marriage. As described more fully in Part III.C, the variability among states' recognition of same-sex couples' relationships can help tease apart some of these complexities.

There are, of course, factors outside the marriage equation that may play a large role in how couples choose to allocate their responsibilities. The preferences, skills, and experience of each individual member of a couple are obviously of central importance. The extent to which the family would face significant economic hardship if one spouse were to drop out of, or minimize participation in, the paid labor force is likewise key. For some couples, religious doctrine is a significant factor. And in terms of legal rights and responsibilities, employment law is also crucial.<sup>49</sup> Notably, all of these other factors likewise both shape and are shaped by societal and legal understandings of marriage—i.e., the marriage equation. My claim is not that the factors in the marriage equation alone will necessarily be dispositive for any given couple, but rather that for most couples, and for government policy, the factors are a highly significant part of the decision-making process. Understanding how the equation has changed over time can therefore help both analyze past reform and identify avenues for future research and policy development.

### *B. The Traditional Equation: Aligned and Mutually Reinforcing*

Historically, sex-based classifications, gender norms, and substantive marriage law were collectively coherent, albeit in a way that subordinated women to men. The three factors of the marriage equation expressed and enforced as ideal a marriage in which the husband took on primary or full breadwinning responsibilities and the wife took on primary or full caretaking responsibilities. Under the doctrine of coverture, which survived until the mid-nineteenth century, a woman lost her legal identity upon marriage.<sup>50</sup> Husbands bore legal responsibility for supporting their wives; wives legally owed their husbands services, including housework,

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48. See Alicia Brokers Kelly, *Negotiating Gender, Vulnerability and Connection in Feminism and Intimate Partnership Law* 32–36 (Oct. 17, 2011) (unpublished manuscript) (on file with author) (gathering sources).

49. The analysis below explores aspects of how employment law intersects with marriage law, but a comprehensive consideration of the employment side of the ledger is beyond the scope of this project.

50. For a detailed history of the doctrine of coverture and its evolution in this country, see generally NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000).



childcare, and sexual services.<sup>51</sup> Wives could not own property or make contracts individually. In many cases, wives were not even responsible for their own criminal actions and husbands were granted a corresponding authority to regulate their wives' conduct so as not to incur liability themselves. Most married women did not work outside the home; if they did, their husbands owned their salaries.<sup>52</sup>

Although the Married Women's Property Acts and other nineteenth-century reforms dismantled the legal fiction that women lost individual identity upon marriage, numerous other sex-based distinctions persisted in the law until the 1970s. Wives were required to take their husbands' names and to follow their husbands if they moved.<sup>53</sup> Upon divorce, dependent wives, but not husbands, could receive alimony.<sup>54</sup> Under the tender-years doctrine, mothers were presumptively awarded custody of young children.<sup>55</sup> Many of the distinctions in family law were putatively for women's benefit, but they were accompanied by other (often sex-neutral) provisions that dramatically limited wives' options and authority, such as the title-based system of marital property that generally assigned ownership exclusively to the breadwinning spouse.<sup>56</sup>

Employment laws reinforced the male breadwinner/female caretaker division of responsibilities. Women were barred from working in specific jobs or professions.<sup>57</sup> Special "protective" labor legislation limited the number of hours that women, but not men, could work.<sup>58</sup> And employers routinely paid married men more than women performing the same work,

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51. See, e.g., Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1456 (1992).

52. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 442–45 (1765); COTT, *supra* note 50, at 11–12.

53. See generally Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 IND. L.J. 893 (2010) (detailed exploration of the history and ongoing pervasiveness of gendered distinctions in marital naming law and conventions).

54. See Norma Basch, *The Emerging Legal History of Women in the United States: Property, Divorce, and the Constitution*, 12 SIGNS 97, 106 (1986) ("Only women could receive alimony."); Mary Kay Kisthardt, *Re-Thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIMONIAL L. 61, 66–67 (2008) (discussing various historical justifications for alimony, including coverture and dower and as damages for husband's breach of marital contract).

55. See Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policy-Making: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 112–13 (1987).

56. See, e.g., COTT, *supra* note 50, at 168–79.

57. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding a Michigan law forbidding female bartenders unless they were the wife or daughter of a male owner).

58. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 416–17, 423 (1908) (upholding an Oregon law limiting the number of hours a woman could work to ten hours per day).

in recognition of their presumed responsibilities to provide for a family.<sup>59</sup> (As Henry Ford explained when doubling the rate paid to married men, “[T]he man does the work in the shop, but his wife does the work in the home. The shop must pay them both.”<sup>60</sup>) Additionally, it was common for employers to adopt formal or informal “marriage bars” which prohibited the hiring and/or retention of married women.<sup>61</sup> Employers also routinely fired women, or required them to take unpaid leave without job security, when they became pregnant, even if they remained physically able to complete their work.<sup>62</sup>

Government social insurance programs, largely created during the 1930s through 1950s, were also structured to meet the needs of the idealized family of a male breadwinner providing for his dependent wife and children.<sup>63</sup> Upon death or retirement of a spouse, dependent wives, but not husbands, could receive social security benefits.<sup>64</sup> Unemployment insurance provided protection for children of out-of-work fathers but not out-of-work mothers.<sup>65</sup> These public programs were reinforced by a rapid growth of employer-sponsored benefits that likewise were structured to meet the needs of the male breadwinner/female caretaker families. Thus, for example, health insurance benefits were typically made available to an employee and to his wife and children. Pension benefits were made

59. See, e.g., Allan Carlson, *Rise and Fall of the American Family Wage*, 4 U. ST. THOMAS L.J. 556, 562–66 (2007).

60. See *id.* at 563 (quoting HENRY FORD, MY LIFE AND WORK 123 (1922)).

61. See CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN 160–79 (1990).

62. See, e.g., Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 452 (2011) (discussing how this remained common practice into the 1970s).

63. This is so familiar in this country as to seem natural, but it is important to note that some other countries have met these needs through programs that do not piggyback on the marital relationship as the presumptive primary basis for meeting the needs of dependent caretakers and children. See, e.g., JILL S. QUADAGNO, THE TRANSFORMATION OF OLD AGE SECURITY: CLASS AND POLITICS IN THE AMERICAN WELFARE STATE 1–2 (1988) (contrasting the development of the American social security system with roughly concurrent development in many European countries of uniform universal pensions); cf. Jochen Clasen & Wim van Oorschot, *Changing Principles in European Social Security*, 4/2 EUR. J. OF SOC. SEC. 89 (2002) (discussing more recent evolution of European social security programs that incorporate elements of universalism, need-based assessment, and reciprocity).

64. Cf. URBAN INST., SOCIAL SECURITY: OUT OF STEP WITH THE MODERN FAMILY 7 (2000) (describing the origins of spousal benefit). For an insightful exploration of the pervasiveness of gender norms in the structuring of social security, see Alice Kessler-Harris, *Designing Women and Old Fools: The Construction of the Social Security Amendments of 1939*, in U.S. HISTORY AS WOMEN’S HISTORY 87 (Linda K. Kerber et al. eds., 1995).

65. Cf. *Califano v. Westcott*, 443 U.S. 76 (1979) (making the Aid to Families with Dependent Children, Unemployed Father program of the Social Security Act, which previously applied only to fathers, apply to either parent).

available to an employee and to his wife and children. Employers could legally limit spousal benefits to female wives of male employees on the assumption that male spouses of female employees would (or at least should) be working themselves and thus receiving benefits through their own employment.<sup>66</sup>

The body of family law, employment law, and related benefits law interacted to assign the husband/father primary responsibility for wage earning and the wife/mother primary responsibility for domestic care. This division privatized responsibility for the care and growth of children, by seeking to ensure that children would receive both financial support and appropriate care. These legal rights reinforced and were in turn strengthened by the separate spheres ideology: men *should* express and prove their masculinity by shouldering the breadwinning responsibilities; women *should* express and prove their femininity by providing nurturing care and support. Well into the twentieth century, limitations on women's economic freedom and pervasive legal distinctions between the sexes were upheld as constitutional on the ground that they appropriately reflected the societal understanding that the preferred and proper place for women was in the home.<sup>67</sup>

Homer Clark characterized the significance of sex-specific responsibilities in family law in a leading domestic relations treatise published in 1968 as follows:

These rules acquire much of their force and vitality from the fact that they construct a model of correct behavior. They are moral precepts . . . [that] describe the traditional roles of husband and wife. The husband is to provide the family with food, clothing, shelter, and as many amenities of life as he can manage. . . . The wife is to be mistress of the household, maintaining the home with the resources furnished by the husband, and caring for the children. A reading of contemporary judicial opinions leaves the impression that these rules have not changed over the last two hundred years, in spite of the changes in the legal position of the married women

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66. Cf. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 n.22 (1983) (citing post-Title VII EEOC decisions holding disparate benefits for spouses of male and female employees unlawful).

67. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (permitting prohibition on female bartenders except where provided sufficient oversight by husband or father); cf. *Hoyt v. Florida*, 368 U.S. 57, 61–62 (1961) (upholding presumptive exclusion of women from jury service on the ground that they are “still regarded as the center of home and family life”).

carried through in the Nineteenth Century and her social and economic position in this century.<sup>68</sup>

Sex-based classifications established substantive rights within marriage and related benefits law that accorded with the normative ideal of male breadwinners and female caretakers. Although the system had an internal, mutually reinforcing logic, it limited women's and men's freedom to choose how to structure their family relationships, characterizing women or men who sought a different role as both "unnatural" and failing to meet their legal responsibilities. It put women in a position that was financially dependent on men and often left women and children vulnerable to inadequate support, particularly in the event of divorce. The reforms of the 1970s eliminated the role that sex-based classifications played in enforcing the traditional gendered divide. It was expected that these changes would in turn transform the gendered ideology that underlay them. This has proven an elusive goal.

## II. DIFFERENT-SEX COUPLES

### A. *The Demise of (Most) Sex-Based Classifications*

In the 1960s and 1970s, a growing women's movement challenged the separate spheres ideology that was embodied and enforced by the sex-based classifications, gender norms, and substantive law that formed the traditional marriage equation. Liberal feminists at the time re-imagined the idealized marriage not as a union of complementary opposites—in which men specialized in breadwinning and women in caretaking—but rather as a partnership in which both men and women would participate in the paid workplace and share the responsibilities of childcare and housework.<sup>69</sup> The enactment, in 1963, of the Equal Pay Act, which prohibits sex discrimination in salary,<sup>70</sup> and, in 1964, of Title VII, which prohibits discrimination in employment more generally,<sup>71</sup> were significant steps

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68. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 181, 182 (1968).

69. See, e.g., NAT'L ORG. FOR WOMEN, *TASK FORCE ON THE FAMILY* (1967), reprinted in *FEMINIST CHRONICLES: 1953–1993* 201 (Toni Carabillo et al. eds., 1993) ("The basic ideological goal of NOW is a society in which men and women have an equitable balance in the time and interest with which they participate in work, family and community. NOW should seek and advocate personal and institutional measures which would reduce the disproportionate involvement of men in work at the expense of meaningful participation in family and community, and the disproportionate involvement of women in family at the expense of participation in work and community.").

70. See 29 U.S.C. § 206(d) (2006).

71. See 42 U.S.C. §§ 2000e–2000e-17 (2006).

forward in removing the explicit impediments to women's paid employment. Courts quickly (for better or worse) interpreted these new laws to preclude sex-specific "protective" labor legislation, thus functionally eliminating what had been the basis for some feminist and progressive advocates' opposition to an Equal Rights Amendment (ERA).<sup>72</sup> In the early 1970s, feminists rallied around the ERA to challenge the sex-specific provisions in marriage and related benefits laws that were still largely in place.

The ERA would have amended the Constitution to provide that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."<sup>73</sup> In 1971 and 1972, when the ERA was debated and ultimately passed by Congress, the Supreme Court had not yet held that sex-based classifications within the law triggered any particular concern under the Equal Protection Clause; accordingly, under then-governing constitutional law principles, such classifications could be used so long as there was any kind of rational justification for them.<sup>74</sup> As discussed above, the sex-based classifications in family law had been easily upheld as justifiable expressions of the traditional norm that men were responsible for breadwinning and women for caretaking.<sup>75</sup>

Enactment of the ERA would have changed this analysis. The likely effect of the amendment would have been to raise the level of scrutiny afforded to sex-based classifications.<sup>76</sup> Proponents of the ERA suggested that some existing sex-based classifications—such as those concerning military service and criminal rape—would be permissible even under more searching standards but that most sex-based classifications within family law would need to be modified.<sup>77</sup> For example, states would need to make

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72. See generally, e.g., Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209 (1998); Dinner, *supra* note 62, at 444–47.

73. Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 872 (1971). This article, written by Yale Law Professor Thomas Emerson and several of his students, analyzed the likely effects of the proposed amendment. It was highly influential and large portions were read verbatim into the Congressional record during debates on the amendment. See 118 CONG. REC. 9517–9522 (1972).

74. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948) (permitting sex-based classifications so long as "basis in reason" could be conceived). In 1971, the Court held for the first time that a sex-based classification violated the Equal Protection Clause but did so under a rational basis standard. See *Reed v. Reed*, 404 U.S. 71, 72–73, 76–77 (1971) (holding Idaho law that preferred males as administrators of estates for individuals who died intestate violated the Equal Protection Clause).

75. See *supra* text accompanying note 67.

76. See Brown et al., *supra* note 73, at 875.

77. See *id.* at 936–54.

alimony available to both dependent wives and dependent husbands, or eliminate it entirely.<sup>78</sup> But the ERA itself would not have foreclosed post-divorce support for dependent spouses. Rather, an influential analysis of the proposed amendment suggested that alimony laws could be written to provide “special protection” to a spouse who had been, or continued to be, out of the workforce in order to provide care for a child.<sup>79</sup> In other words, it would not have mandated that men take on domestic or that women take on breadwinning responsibilities.

The marriage equation lens helps make the possibility and limitations of this approach clear. As discussed above, all three factors of the marriage equation—sex-based classifications, gender norms, and substantive marriage law—historically reinforced separate spheres for men and women by encouraging or requiring distinct roles. If the primary objective of reform was to move from legally enforced specialization to equal sharing of domestic and income-producing responsibilities, the most effective means of doing so would have been to reform *both* the sex piece of the equation *and* the marriage piece of the equation and hope that these combined changes would spur couples to share responsibilities and help break down gender norms. In other words, it would have been more effective to not only remove sex-based classifications but also all the non-sex-specific elements of marriage law that likewise encouraged specialization.<sup>80</sup>

Liberal feminist advocacy at the time, however, prioritized reform only of the “sex” piece of the equation—that is, the sex-specific laws that imposed distinct obligations on husbands and wives. In part, this probably reflects an accurate gauge of what was politically possible. It also highlights the tightrope reformers walked, and one that continues to be a challenge today. Significant changes to the non-sex-specific incentives that encouraged or responded to specialization within marriage, such as social security benefits for dependent spouses, would disadvantage the (many) women who remained in marriages that embraced traditional gender roles. The National Organization for Women (NOW) floated a few trial balloons regarding more substantive reforms of marriage law, and some radical feminists groups denounced marriage entirely as

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78. *See id.* at 951–53.

79. *Id.* at 952. NOW took a similar position. *See* NAT’L ORG. FOR WOMEN, ERA POSITION PAPER (1967), reprinted in *FEMINIST CHRONICLES: 1953–1993* 182, 189 (Toni Carabillo et al. eds., 1993).

80. *See infra* Part II.B.

fundamentally flawed by its patriarchal past.<sup>81</sup> But, other than its ERA advocacy, NOW (which was then the leading “mainstream” feminist organization) sought to achieve its objective of men and women sharing work and family responsibilities primarily through reforms such as government support for childcare, increased workplace accommodation of caregiving responsibilities, and individual control of reproductive life, rather than reform of substantive aspects of marriage and related benefits law that protected dependent spouses.<sup>82</sup>

Opponents of the ERA, by contrast, strategically used the interaction among sex, gender, *and* substantive marriage law to argue against the amendment. In Congress, Senator Sam Ervin took the lead in opposing the amendment, with arguments that two historians have characterized as a “plea[] for the traditional view of women in which gender (culture) and sex (anatomy) are fused.”<sup>83</sup> He proposed amendments to the ERA that would have permitted sex-based classifications to remain in any laws that were “reasonably designed to . . . enable [women] to perform their duties as homemakers or mothers.”<sup>84</sup> Although Ervin’s efforts were unsuccessful, and the ERA easily passed both houses of Congress, his speeches were subsequently reprinted and circulated widely in the efforts to stop ratification by the states.

Phyllis Schlafly, who led the grassroots opposition movement, likewise elided the three elements of the marriage equation. She characterized the ERA as an assault on homemakers, something that would deprive them of legal protection and undermine their status within society. In her first published attack on the ERA, she contended that:

Women’s lib is a total assault on the role of the American woman as wife and mother, and on the family as the basic unit of society. Women’s libbers are trying to make wives and mothers unhappy

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81. See, e.g., ALICE ECHOLS, *DARING TO BE BAD: RADICAL FEMINISM IN AMERICA 1967–1975* 170 (1989) (describing protest which characterized marriage as making women “prisoner[s]” of their husbands).

82. NOW’s 1967 Task Force on the Family identifies universal childcare as the top priority to implement equitable sharing between men and women of domestic and income-producing responsibilities. Of the twelve measures it recommended to achieve this objective, five related to employment law; two to education; one to reproductive freedom; one to childcare; one to no-fault divorce; and two to changes in social security or tax law that would decrease the extent to which they encourage couples to specialize. See NAT’L ORG. FOR WOMEN, *TASK FORCE ON THE FAMILY*, *supra* note 69, at 201–04.

83. DONALD G. MATHEWS & JANE SHERRON DE HART, *SEX, GENDER, AND THE POLITICS OF ERA* 45 (1990).

84. *Equal Rights 1970: Hearings on S.J. Res. 61 and S.J. Res. 231 Before the S. Comm. on the Judiciary*, 91st Cong. 8 (1970) (statement of Sen. Ervin).

with their career, to make them feel that they are ‘second-class citizens’ and ‘abject slaves.’ Women’s libbers are promoting free sex instead of the ‘slavery’ of marriage. They are promoting Federal ‘day-care centers’ for babies instead of homes. They are promoting abortions instead of families.<sup>85</sup>

In subsequent newsletters, and in her 1977 book *The Power of the Positive Woman*, Schlafly developed these themes. Ignoring the fact that the right to support was almost impossible to enforce, Schlafly argued that the ERA would abolish the “most basic and precious legal right that wives now enjoy: the right be a full-time homemaker.”<sup>86</sup> Referencing an Ohio report that suggested that the ERA might require the state to provide childcare services to ensure that mothers, like fathers, had “freedom” to engage in activities outside the home, Schlafly contended that “[e]limination of the role of ‘mother’ is a major objective of the women’s liberation movement.”<sup>87</sup> Schlafly argued that these and other legal developments advocated by some ERA supporters—such as requiring social security taxes be paid on the contributions made by homemakers—would collectively force women out of the home and were part of an effort to “deliberately degrade[] the homemaker and hack[] away at her sense of self-worth and pride and pleasure in being female.”<sup>88</sup> The underlying legal analysis in many of these points is debatable, but Schlafly’s arguments, not surprisingly, were extremely successful in mobilizing many homemakers to oppose the ERA.

The key thing for purposes of this discussion is to note how Schlafly’s claims merged removal of sex-based classifications within law—that is, the distinctions between husbands’ and wives’ rights and responsibilities—with substantive reform of marriage law and gender norms. The ERA would not have required abandonment of alimony or support provisions. Thus, enactment of the ERA would not have ended the “right to be a full-time homemaker” (to the extent any such right ever existed). It simply would have permitted either men or women to play that role. NOW and other feminists actually advocated other reforms that were intended to *increase* the security that homemakers would have upon

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85. Phyllis Schlafly, *What’s Wrong with “Equal Rights” for Women*, 5 PHYLLIS SCHLAFLY REP. 3–4 (1972) (quoted in Reva B. Siegel, *You’ve Come a Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1876 (2006)).

86. SCHLAFLY, *supra* note 7, at 79.

87. *Id.* at 87.

88. *Id.* at 69.



divorce.<sup>89</sup> But Schlafly effectively elided distinctions between “sex,” “marriage,” and “gender” (“the pleasure in being female”) to make her larger point. Historians credit widespread resistance to changing the underlying gender norms as key in defeating the amendment.<sup>90</sup>

As the ERA was being debated and as efforts to enact it eventually ground to a halt, liberal feminists, led by Ruth Bader Ginsburg as director of the ACLU’s Women’s Rights Project, successfully argued that the sex-based classifications within family law were unconstitutional under the existing Equal Protection Clause.<sup>91</sup> In *Reed v. Reed*<sup>92</sup>—a challenge to an Idaho law that established a presumption in favor of men over women in the appointment of administrators of estates—the Court first held that such distinctions could violate the Constitution.<sup>93</sup> The Court went on to announce in 1976 that sex-based classifications merited heightened scrutiny<sup>94</sup> (although not as rigorous as that applied to race-based classifications). The Court struck down a host of sex-based classifications that enforced the separate spheres ideology of the family: a presumption that unwed fathers, but not mothers, were inadequate caregivers for their children;<sup>95</sup> a presumption that wives, but not husbands, of service members were dependent on their spouses;<sup>96</sup> a categorical ban on widowers, but not widows, with minor children receiving social security survivors’ benefits;<sup>97</sup> a law that extended child support for boys until age twenty-one but for girls only until age eighteen;<sup>98</sup> a law that provided alimony upon divorce for women but not for men;<sup>99</sup> and a law that provided benefits to children of unemployed fathers, but not unemployed

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89. See, e.g., NAT’L ORG. FOR WOMEN, ERA POSITION PAPER, *supra* note 79, at 189.

90. See generally, e.g., JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* (1986); MATHEWS & DE HART, *supra* note 83; Peggy Pascoe, *Sex, Gender, and Same-Sex Marriage*, in *IS ACADEMIC FEMINISM DEAD? THEORY IN PRACTICE* 86, 96–102 (Soc. Justice Grp. at The Ctr. for Advanced Feminist Studies, Univ. of Minn. ed., 2000).

91. For a fascinating exploration of Ginsburg’s litigation strategy and its connection to the women’s and gay liberation movements, see Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010).

92. 404 U.S. 71 (1971).

93. *Id.*

94. See *Craig v. Boren*, 429 U.S. 190, 204 (1976) (articulating a “requirement that the gender-based difference [in a law] be substantially related to achievement of the statutory objective”).

95. See *Stanley v. Illinois*, 405 U.S. 645 (1972). In that case, the Court held that the father’s due process rights were violated by the failure to provide him with an opportunity to contest the state’s determination of neglect, but also identified an “equal protection” violation in the distinction between unmarried fathers and unmarried mothers in protection of these procedural interests. See *id.* at 649.

96. See *Frontiero v. Richardson*, 411 U.S. 677 (1973).

97. See *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

98. See *Stanton v. Stanton*, 421 U.S. 7 (1975).

99. See *Orr v. Orr*, 440 U.S. 268 (1979).

mothers<sup>100</sup> (as well as a law that permitted girls to buy low-alcohol beer at a younger age than boys).<sup>101</sup> These decisions collectively dismantled almost all sex-based distinctions within marriage law and related benefits laws by making the responsibilities of husbands and wives identical and reciprocal. Under modern sex discrimination law, sex-based classifications are almost always invalid unless they respond to “real” physical differences between the sexes.<sup>102</sup>

Leading constitutional scholars characterize this body of constitutional case law as a “de facto ERA”<sup>103</sup> that has accomplished “virtually everything the ERA would have accomplished.”<sup>104</sup> This may be correct, but it is a relatively thin understanding of the potential promise of the ERA. Supporters believed—and hoped—that the ERA would not merely strip sex-based classifications from the law. They hoped that it would also spur a more general realignment of gender norms within the family, and within society as a whole, that would lead to a more equal sharing of responsibilities at home as well as at work. Whether or not this would have occurred is impossible to assess definitively.<sup>105</sup>

What is clear, however, is that the body of Supreme Court decisions did not effect a general transformation in gender roles. That is, the Court made clear that the government could not rely upon generalizations regarding appropriate roles for men and women, or the empirical reality that far more women than men were dependent on their spouses for economic support, as justification for sex-specific classifications in the

100. See *Califano v. Westcott*, 443 U.S. 76 (1979).

101. See *Craig v. Boren*, 429 U.S. 190 (1976).

102. These include laws regulating statutory rape, see *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (plurality opinion); birth, see *Nguyen v. INS*, 533 U.S. 53 (2001); and military service, see *Rostker v. Goldberg*, 453 U.S. 57 (1981). Notably, several justices in each case argued that the sex-based classifications in each law reflected overbroad stereotypes and should be held unconstitutional. See, e.g., *Michael M.*, 450 U.S. at 496 (Brennan, J., dissenting); *Nguyen*, 533 U.S. at 89–91 (O’Connor, J., dissenting); *Rostker*, 453 U.S. at 86 (Marshall, J., dissenting). See also text accompanying *supra* notes 41–46 (discussing the difficulty of drawing lines between “gender” and “sex”).

103. See, e.g., Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 984–85 (2002) (“The social changes that did not quite produce the Equal Rights Amendment produced a de facto ERA in the Court’s equal protection jurisprudence.”).

104. William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 502 (2001); see also, e.g., David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1476–77 (2001) (“Today, it is difficult to identify any respect in which constitutional law is different from what it would have been if the ERA had been adopted.”).

105. Cf. MANSBRIDGE, *supra* note 90, at 2 (“[The ERA’s] direct effects would have been slight, but its indirect effects on both judges and legislators would probably have led in the long run to interpretations of existing laws and enactment of new laws that would have benefited women.”).

law.<sup>106</sup> The Court held that the separate spheres ideology that “the female [is] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas” expressed impermissible sex stereotypes.<sup>107</sup> But it did not require the government to take steps to affirmatively dismantle the gendered division of responsibility or to implement policies that would encourage such realignment.<sup>108</sup> In fact, Reva Siegel and Cary Franklin argue that the debates over the ERA—and the popular backlash against it—caused the attorneys in the foundational constitutional sex discrimination cases to cabin the scope of the changes they sought.<sup>109</sup>

Many commentators therefore look back at this series of decisions as a rather hollow victory.<sup>110</sup> Some scholars go further, arguing that formal equality imposed a symbolic notion of “equality” that makes it difficult to achieve structural reforms that could be far more effective in improving the condition of women.<sup>111</sup> The marriage equation framework helps make the contours and limits of this reform clear. The constitutional decisions of the 1970s changed the marriage equation by requiring that legislatures strip sex-based classifications from the law. But they did not change the substantive marriage law and they had only a limited effect on gender norms. As discussed more fully below, the modified marriage equation left by these decisions, which persists to this day, does not actually encourage

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106. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (“[A]ny statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands ‘dissimilar treatment for men and women who are . . . similarly situated,’ and therefore involves the ‘very kind of arbitrary legislative choice forbidden by the [Constitution] . . . .’” (emphasis and omissions in original) (quoting *Reed v. Reed*, 404 U.S. 71, 77, 76 (1971))).

107. *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975); see also, e.g., *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (holding laws based merely on the “presum[ption] the father has the ‘primary responsibility to provide a home and its essentials,’ while the mother is the ‘center of home and family life’” unconstitutional (citations omitted)).

108. The Court’s unwillingness to recognize disparate impact as a potential ground for liability under the Equal Protection Clause largely foreclosed constitutional challenges to sex-neutral policies, such as employment preferences for veterans, that disproportionately benefit men. See *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979).

109. See Siegel, *supra* note 37, at 1395–99 (describing shift in litigation away from articulating issues related to abortion on equality grounds in response to advocacy against the ERA); Franklin, *supra* note 91, at 140–41 (similar); see also Serena Mayeri, *A New E.R.A. or a New Era? Amendment Advocacy and the Reconstitution of Feminism*, 103 NW. U. L. REV. 1223 (2009) (discussing how substantive understandings of the ERA evolved).

110. See, e.g., Judith Baer, *Advocate on the Court: Ruth Bader Ginsburg and the Limits of Formal Equality*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 216, 230–33 (Earl M. Maltz ed., 2003); Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21 (characterizing both liberal and dominance feminist approaches to legal changes as “empty at their core” because they “offer[] no values inconsistent with patriarchal values”).

111. See, e.g., MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991).

couples to share equally domestic and income-producing responsibilities. Rather, the equation changed from one in which sex-based classifications, gender norms, and marriage law collectively required men to provide support and women to provide caretaking to one which in many respects *still encourages specialization* but is formally agnostic regarding which spouse plays which role.

### *B. The Gender of Marriage Law*

The body of Supreme Court decisions issued in the 1970s that held sex-based classifications in family law and related benefits law to be unconstitutional was a significant development in sex discrimination law. The Court held, for the first time, that sex-based classifications in the law could not be justified simply on the grounds that they promoted, or reasonably responded to the prevalence of, the traditional division of responsibility between husbands and wives. The stereotyping theory that the Court adopted in these cases continues to have significant import today.<sup>112</sup>

But the decisions have a separate legacy that is far less considered.<sup>113</sup> By simply requiring formal equality, the Court left in place an architecture of marriage and related benefits laws that, while no longer sex-specific, nevertheless continues to encourage couples to specialize into breadwinning and caretaking roles. I call these incentives to specialize the “gender” of marriage law. Consider, for example, *Weinberger v. Wiesenfeld*.<sup>114</sup> In *Weinberger*, the Court held unconstitutional a provision in social security law that provided benefits for mothers with minor children whose wage-earning husbands had died but did not provide comparable benefits for fathers with minor children whose wage-earning wife had died.<sup>115</sup> In accordance with the decision in *Weinberger*, this and numerous other provisions of social security law were expanded to cover fathers as well as mothers, husbands as well as wives. But the substance of social security dependent benefits, structured originally to meet the needs

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112. See generally Franklin, *supra* note 91 (discussing historical context for anti-stereotyping theory and its contemporary relevance).

113. Nancy Polikoff is an important exception. She has carefully catalogued many of the ways in which marriage law encourages spousal specialization and this informs her skepticism regarding the normative attractiveness of marriage as an objective for gay and lesbian couples. See generally POLIKOFF, *supra* note 17.

114. 420 U.S. 636 (1975).

115. *Id.*

of a family with a breadwinning husband and a caretaking wife, was not changed.<sup>116</sup>

Social security permits a dependent spouse to collect 50 percent of the benefits earned by a breadwinning spouse when the dependent spouse reaches retirement age, in addition to the benefits collected by the breadwinning spouse.<sup>117</sup> A dependent spouse may also receive benefits to support herself or himself<sup>118</sup> and/or dependent children<sup>119</sup> upon the death of a wage-earning spouse. These benefits are also available to divorced spouses if the marriage has lasted at least ten years.<sup>120</sup> In other words, even if a dependent spouse has not engaged in paid work (and thus has not paid into the social security system at all), she or he is entitled to significant benefits based on her or his spouse's contributions. Although the policy is now formally sex-neutral, almost all of the beneficiaries are couples in which the husband dramatically out-earned the wife; a recent study found that 99% of claimants of spousal benefits are women.<sup>121</sup> Couples in which both spouses earn relatively similar incomes generally do not benefit from these provisions because each individual's *own* benefit rate is higher than the dependent benefits they could collect. Social security thus subsidizes specialization by spouses into breadwinning and caregiving roles and spreads the risk associated with such specialization across the wage-earning, social-security-tax-paying workforce. In a somewhat stylized but still illuminating example, a married couple in which one spouse earns twice the national average wage and the other spouse does not engage in paid work collectively receives \$100,000 more in social security benefits over a typical lifetime than a married couple in which each spouse earns the national average wage.<sup>122</sup> Efforts to "update" the law to better protect

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116. Phyllis Schlafly used the possibility that these spousal benefits would be eliminated as one of her prominent arguments against the ERA. See *ERA Will Take Away Social Security Rights of Wives and Widows*, EAGLE FORUM, <http://www.eagleforum.org/era/flyer/ERA-07.pdf>.

117. See 42 U.S.C. § 402(b) (2006) (wives' benefits); 42 U.S.C. § 402(c) (2006) (husbands' benefits).

118. See 42 U.S.C. § 402(e) (2006) (widows' benefits); 42 U.S.C. § 402(f) (2006) (widowers' benefits).

119. See 42 U.S.C. § 402(g) (2006) (mothers' and fathers' benefits).

120. See 42 U.S.C. § 402(b), (c), (d), (e) (2006); 42 U.S.C. § 416(d) (2006) (defining divorced spouses).

121. See Theodore F. Figinski, *Women and the Social Security Earnings Test*, 1 n.2 (Mar. 31, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1821290>. The extraordinarily lopsided sex-allocation is undoubtedly in part because the benefits are available to retired workers and thus reflect a more traditional allocation of wage earning than will be true in the future as younger couples, including a greater percentage where wives significantly out-earn husbands, reach retirement age.

122. Eugene Steuerle et al., *Does Social Security Treat Spouses Fairly?*, URBAN INS. (Nov. 30, 1999), <http://www.urban.org/publications/309257.html>. These rules also mean that a married couple

couples who share wage-earning responsibilities more equally have been consistently unsuccessful.<sup>123</sup>

Federal tax law, likewise, encourages such specialization. It imposes a “marriage penalty” on many married couples who earn relatively comparable amounts—those couples pay more than they would pay collectively if they were able to file individual returns—and provides a “marriage bonus” for couples with a significant disparity in earnings.<sup>124</sup> Because of marital joint returns, the earnings of a “secondary” wage earner are taxed at higher rates than they otherwise would be.<sup>125</sup> Additionally, if both members of the couple work outside the home, they pay taxes on the income they earn, including income used to purchase childcare services (other than a limited credit or set-aside) or assistance with housework.<sup>126</sup> By contrast, if one member of the couple stays home and provides childcare or housework services herself or himself, the couple pays no tax on the imputed value of such services, further increasing the marriage “bonus” for couples with such specialization.<sup>127</sup> Additionally, employers often make health insurance available to an employee and her or his spouse and dependents. This benefit, when used by married couples, is not taxed; even if employers offer such benefits to partners of gay and lesbian

with a single wage earner receives far more in collective benefits than a wage earner who makes the same salary as the breadwinner but is not married.

123. See generally Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 WIS. L. REV. 1.

124. See Stephanie Hunter McMahon, *To Have and to Hold: What Does Love (of Money) Have to Do with Joint Filing?*, 11 NEV. L.J. 718, 719–20 (2011). Statutes enacted in 2001 and 2003 largely removed the marriage penalty for taxpayers in the lower tax brackets, but penalties remain for higher-income families. These changes actually increased the marriage bonus for many families with a single primary wage earner. Although they were politically popular, the future of these reforms is in question as they are set to expire along with other Bush-era tax changes. See *id.* For other discussions of the effects of marriage penalties and bonuses, see, for example, EDWARD J. MCCAFFERY, *TAXING WOMEN* 12–19 (1997); McMahon, *supra* at 720 n.10 (citing a number of relevant sources); Shari Motro, *A New “I Do”: Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509, 1560–68 (2006).

125. Scholars have long critiqued this as discouraging employment by women. See McMahon, *supra* note 124, at 720 n.10.

126. An individual or a couple who purchases childcare for work-related needs generally may elect to receive a tax credit for a portion of childcare expenses or to set aside up to \$5000 of pre-tax income to purchase childcare services. See IRS PUB. NO. 503, *CHILD AND DEPENDENT CARE EXPENSES* 9 (2010), available at <http://www.irs.gov/pub/irs-pdf/p503.pdf>. The expense of full-time child care often far exceeds these potential tax savings. See, e.g., NAT’L ASS’N OF CHILD CARE RES. & REFERRAL AGENCIES, *PARENTS AND THE HIGH COST OF CHILD CARE: 2011 UPDATE 7*, available at [http://www.naccrra.org/sites/default/files/default\\_site\\_pages/2011/cost\\_report\\_2011\\_full\\_report\\_0.pdf](http://www.naccrra.org/sites/default/files/default_site_pages/2011/cost_report_2011_full_report_0.pdf) (“The average cost of full-time child care for an infant in a center in 2010 ranged from \$4,650 in Mississippi to more than \$18,200 in the District of Columbia” and the comparable average annual cost for a four-year-old child ranged from “\$3900 in Mississippi to \$14,5000 in the District of Columbia”).

127. See Lily Kahng, *One is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651, 662 (2010).

employees (or domestic partners of unmarried heterosexual employees), the employees must pay a tax on the value of the policy.<sup>128</sup>

Although having one spouse opt out of the paid labor market is often conceived of as a “luxury” for the middle- or upper-class, two of the most significant government assistance programs for low-income families also encourage, or at least permit, a breadwinner-caretaker divide for married couples. In 1996, welfare was dramatically reformed to move recipients from “welfare to work.” Supporters of the legislation justified work requirements by pointing to the statistics, discussed in Part II.C, showing dramatic increases in the number of mothers in the paid work force and arguing that poor women receiving government support should likewise be required to work outside the home. But as Noah Zatz has demonstrated, the federal legislation actually imposes hourly work requirements on families collectively. In single-parent families, the parent (usually a mother) must work to receive benefits, but two-parent families can receive benefits so long as either parent, or the two parents together, meets slightly higher hour requirements.<sup>129</sup> Similarly, the Earned Income Tax Credit (EITC) determines eligibility for benefits on the basis of household earnings, with identical or almost identical standards applying for single-parent households and dual-parent households.<sup>130</sup> Under both programs, since the value of childcare provided by a parent is not imputed as income, it will often make sense for one parent to provide childcare and the other to perform the paid work.<sup>131</sup> This is all the more true since earned income by both parents could easily push even a quite poor family over the

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128. See M.V. LEE BADGETT, UNEQUAL TAXES ON EQUAL BENEFITS: THE TAXATION OF DOMESTIC PARTNER BENEFITS 1, 4 (2007), <http://www.policyarchive.org/handle/10207/bitstreams/18040.pdf>. This is true even if they are married under state law, because federal tax law does not recognize the marriage. See *id.*

129. See Noah D. Zatz, *Revisiting the Class-Parity Analysis of Welfare Work Requirements*, 83 SOC. SERV. REV. 313, 322 (2009). The Temporary Assistance for Needy Families (TANF) program requires a single parent to work (or participate in other qualifying activities, which include some education and training programs) at least thirty hours per week, although some exceptions apply to parents with children under the age of six. *Id.* at 317. Two-parent families must work collectively at least thirty-five hours per week (far less than the sixty hours per week that would be the equivalent of simply twice the single-parent requirement). *Id.* at 322. The majority of states permit the two-parent work requirement to be satisfied by either parent or by the parents collectively; a few encourage or require that they be satisfied by a single breadwinner. See *id.* at 326–27. By contrast, a significant minority of states require both parents to do at least some work and some further require an equal division. See *id.*

130. See Gregory Acs & Elaine Maag, *Irreconcilable Differences? The Conflict Between Marriage Promotion Initiatives for Cohabiting Couples with Children and Marriage Penalties in Tax and Transfer Programs*, in NEW FEDERALISM: NAT’L SURVEY OF AM.’S FAMILIES, at 2 (Urban Inst. Ser. No. B-66) (Apr. 2005); Zatz, *supra* note 129, at 328.

131. Cf. Zatz, *supra* note 129, at 341.

eligibility threshold. Indeed, although the EITC has been shown to increase single mothers' employment, it seems to decrease married mothers' employment.<sup>132</sup>

For many couples, an extra wage more than compensates for the tax, social security, welfare, or EITC benefits described above. Nonetheless, at least for couples in which one spouse's earning potential far exceeds the other spouse's, or where the cost of paying for childcare (or elder care) and other domestic services is close to the wages that one spouse would earn, such provisions can encourage couples to specialize in breadwinning and caregiving roles.<sup>133</sup>

The incentives embodied in these government programs are complemented by societal and personal understandings of marriage that likewise encourage many couples to specialize. A decision to marry is a statement from each member of the couple that they intend to remain in the relationship, ideally for life. Marriage naturally encourages a shift from an individualized focus to a family-based focus for decision-making. Members of a family develop interdependencies. They can take advantage of individual skills and aptitudes and reap gains from specialization. They can subordinate immediate interests of one or both members of the couple for expected collective long-term gain. There is nothing inherently gendered in dividing responsibilities with a spouse in a complementary fashion, but as discussed more fully below, in the vast majority of different-sex couples, women take on greater responsibility for non-income producing domestic work and men for income-producing work.<sup>134</sup>

The gendered architecture of marriage law also persists in the protections that state laws provide to a dependent spouse if the relationship comes to an end. First, marriage law makes it hard to exit a relationship. A court must adjudicate a divorce or approve a settlement. In most states, a court has the power to award a share of property acquired during a marriage, regardless of title.<sup>135</sup> Courts are generally instructed to "equitably divide" such property; a typical statute requires consideration of factors such as the extent to which one spouse has provided care for children or has facilitated the other spouse's wage-earning, as well as the

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132. Nada Eissa & Hilary Williamson Hoynes, *Taxes and the Labor Market Participation of Married Couples: The Earned Income Tax Credit*, 88 J. PUB. ECON. 1931, 1932 (2004).

133. My thanks to Stephanie McMahon for helping me to clarify this point.

134. See *infra* Part II.C.

135. See, e.g., 23 PA. CONS. STAT. ANN. § 3501 (West 2010) (allowing for the division of marital property upon divorce); Thomas Oldham, *Changes in the Economic Consequences of Divorces, 1958–2008*, 42 FAM. L. Q. 419, 427–29 (2008) (discussing emergence of equitable distribution).



relative ability of the spouses to support themselves.<sup>136</sup> Courts are also empowered, at least in certain circumstances, to order a wage-earning spouse to make maintenance or alimony payments to a dependent spouse even after a marriage has ended.<sup>137</sup> Even though the vast majority of divorces are resolved through private negotiations, dependent spouses negotiating in the “shadow of the law” can use these substantive entitlements to strengthen their position.<sup>138</sup>

As discussed more fully below, contemporary marriage law is far from sufficient to protect fully a dependent spouse’s financial standing after divorce.<sup>139</sup> But the law provides considerably greater recourse to a dependent *spouse* than to a similarly situated person *cohabiting* with a partner. Marriage law establishes as a default an expectation that property accumulated and income earned during the marriage will be shared, and it empowers courts to effectuate such divisions.<sup>140</sup> By contrast, no court needs to be involved when a cohabiting relationship ends, and (if courts do become involved) the legal default is that individual members of the couple leave the relationship with the income each earned and any property such income was used to acquire. In other words, a dependent cohabitor who drops out of the workplace to provide domestic support might well have no claim to property or income accumulated by her partner.<sup>141</sup> Even if a dependent cohabitor has the foresight, resources, and

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136. See, e.g., 23 PA. CONS. STAT. ANN § 3502(a) (West 2010) (factors considered in equitable distribution include the contribution by one party to the increased earning power of the other, including contributions as a homemaker; the amount and sources of income of each party; and the opportunity for future income). Equitable distribution statutes also however typically consider the extent to which each party contributed to the acquisition or appreciation of marital property, a factor that can favor the breadwinning spouse. See *id.*

137. See, e.g., 23 PA. CONS. STAT. ANN § 3701 (West 2010) (allowing courts to award alimony). Pennsylvania still permits courts to award open-ended alimony. See *id.* § 3701(c). Many other states now generally permit only short-term awards designed to permit a dependent spouse to become self-sufficient. See *infra* text accompanying note 213.

138. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

139. See *infra* Part II.D.

140. Through prenuptial and other contractual agreements, married couples may depart from these defaults, but courts typically review such contracts for procedural and, in many states, substantive fairness. See, e.g., *In re Estate of Hollett*, 834 A.2d 348, 351–52 (N.H. 2003) (describing heightened scrutiny applied to prenuptial agreements).

141. If the couple has children in common, and if the dependent cohabitor maintained custody of the children after dissolution of the relationship, she or he would have a claim for child support. Additionally, some states recognize implicit contracts or equitable principles such as unjust enrichment as grounds for allocating a share of income to the dependent cohabitor. See, e.g., *Marvin v. Marvin*, 134 Cal. Rptr. 815, 829–30 (Ct. App. 1976); *Glasgo v. Glasgo*, 410 N.E.2d 1325, 1330–31 (Ind. Ct. App. 1980). There is little empirical research on the economic effects of ending a cohabitation, but one study found that female cohabitators’ standard of living drops far more dramatically than male cohabitators’ standard of living when the relationship ends. See Sarah Avellar & Pamela Smock, *The*

bargaining power to contract explicitly with a partner for financial recompense if the relationship unravels, she or he may still have no legal recourse because courts in some states refuse to enforce even express contracts between cohabitators.<sup>142</sup>

The law makes similar distinctions between married and unmarried individuals upon death. If a married individual dies without a will, intestacy laws typically provide that at least half, and in some states and under some circumstances, all, of an estate passes to a spouse. If a married individual dies with a will, state laws typically provide that, regardless of the will's terms, a spouse has a right to elect to receive between one third and one half of the estate.<sup>143</sup> Federal tax law permits property to pass to a surviving spouse tax-free.<sup>144</sup> By contrast, if a cohabiting partner dies intestate, his or her property will pass to his or her children, parents, siblings, or other family members, or simply revert to the state, rather than to the partner.<sup>145</sup> Even if an individual has left property to a cohabiting partner in a will, the partner will often need to pay taxes that a spouse would be excused from paying.

Employment law also retains a significantly "gendered" architecture. A comprehensive discussion of employment law is beyond the scope of this Article, but as described in Part I.B, employment law, like family law, once used sex-based classifications to enforce the separate spheres ideology. Most explicit distinctions on the basis of sex were made illegal by the enactment of the Equal Pay Act and Title VII.<sup>146</sup> But, as in family law, these laws primarily have been held to simply require formal equality, and thus the norms and substantive law of the workplace, designed around

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*Economic Consequences of the Dissolution of Cohabiting Unions*, 67 J. MARRIAGE & FAM. 315, 324 (2005). The drop experienced by female cohabitators was less severe than that experienced by wives following a divorce, but the researchers attributed this to the fact that married household incomes are considerably higher on average than cohabiting household incomes. *See id.* at 323. As the researchers put it, "relationship dissolution . . . [is] an equalizer among married and cohabiting women. When a coresidential union ends, women end up in strikingly similar positions; some just fall farther to get there." *Id.* at 325.

142. *See, e.g.*, *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979).

143. For a detailed description of each state's laws regarding transfer of property upon death, see Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227. Rosenbury argues that divorce laws often provide greater protection to a dependent spouse than the laws governing property distribution at death. *See id.* at 1260–61, 1273–74.

144. *See generally* INTERNAL REVENUE SERVICE, PUBLICATION 950: INTRODUCTION TO ESTATE AND GIFT TAXES (Rev. 2011), available at <http://www.irs.gov/pub/irs-pdf/p950.pdf>. Gifts between spouses are also tax-free. *See id.*

145. *See, e.g.*, Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 2009 QUINNPIAC PROB. L. J. 36, 55, 57–58.

146. *See* 29 U.S.C. § 206(d) (2006); 42 U.S.C. §§ 2000e to 2000e-17 (2006).

a (male) worker with (female) support at home, remain largely in place.<sup>147</sup> The standard in American law is a forty-hour work week that far exceeds the hours children are in school; mandatory overtime is permitted and common; and there is no right to take time off to care for a child who needs to miss a day of school for a routine illness or to go to a doctor.<sup>148</sup> The Family and Medical Leave Act provides unpaid leave upon birth or adoption of a child, and to care for a family member with a serious health condition,<sup>149</sup> but roughly half of American workers do not qualify for FMLA leave, either because their employer is too small or because they have not worked a requisite number of hours.<sup>150</sup> Many more cannot afford to take unpaid time off.

Employee benefits in turn facilitate a choice by a married couple to have one spouse drop out of the paid workforce by providing benefits to a dependent spouse and children. Employers that provide health care benefits typically make them available only to employees, their spouses, and their dependents. Other employer-sponsored benefits, such as pension rights, likewise are typically made available to an employee and a spouse. Employers *could* choose to provide some of these benefits to unmarried partners of employees, but most use marriage as a bright line test to

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147. See, e.g., JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 64–113 (2000) (discussing masculine “ideal worker” norm). Title VII also prohibits facially neutral policies that cause a “disparate impact” on the basis of sex, but courts’ generous interpretation of the “business necessity” defense has limited the utility of these provisions to challenge non-family-friendly policies. See, e.g., Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1226–30 (1989) (discussing difficulty of overcoming business necessity defense). Joan Williams and Nancy Segal characterize the limitations of disparate impact liability as “accepted wisdom,” but identify a few cases in which disparate impact claims have been successful. Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77, 78, 134–38 (2003). More importantly, they also identify several other claims that can be used to challenge what they call the “maternal wall.” See *id.* at 122–61 (discussing disparate treatment theories under Title VII as well as claims under other statutes including the Americans with Disabilities Act, the Family and Medical Leave Act, the Equal Pay Act, and state statutes).

148. See, e.g., Shirley Lung, *Overwork and Overtime*, 39 IND. L.J. 51, 58 (2005) (explaining the Fair Labor Standards Act “establishes the forty-hour work week as the norm” and “permit[s] employers to require unlimited overtime hours if they [a]re willing to pay for it”); *id.* at 61 (citing study finding one-third of workers who performed overtime were forced by their employer to do so); U.S. Joint Economic Committee, *Expanding Access to Paid Sick Leave: The Impact of the Healthy Families Act on America’s Workers 2* (2010), available at [http://jec.senate.gov/public/index.cfm?a=Files.Serve&File\\_id=abf8aca7-6b94-4152-b720-2d8d04b81ed6](http://jec.senate.gov/public/index.cfm?a=Files.Serve&File_id=abf8aca7-6b94-4152-b720-2d8d04b81ed6) (advocating for enactment of legislation guaranteeing most workers paid sick days and stating that “millions of workers are unable to miss work without forgoing a paycheck—or risking job loss”).

149. See 29 U.S.C. § 2612(a)(1)(A)–(C) (2006).

150. See U.S. Dep’t of Labor, *Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request for Information*, 72 FED. REG. 35550, 35622 (2007) (2005 data showing 76.1 million of 141.7 million total U.S. employees, or approximately 54%, are eligible).

determine eligibility, and, as noted above, tax policy and other regulation encourages this.

Empirical studies have attempted to track the significance of the bundle of legal rights discussed above on decision-making by different-sex couples. Studies that compare the labor allocation of married couples to that of cohabiting couples provide support for the assertion that marriage encourages specialization. Although researchers disagree as to the significance of certain subsidiary factors, numerous studies find that married couples, as compared to cohabiting couples, are more likely to make long-term cooperative investments in each other and in their relationships, such as those implicit in specializing into breadwinning and caregiving roles.<sup>151</sup> However, researchers have recognized that with different-sex couples, the significance of these studies may be limited by concerns that they reflect a “selection bias”: different-sex couples who choose long-term cohabitation rather than marriage may have a predilection for greater individual autonomy.<sup>152</sup> As discussed more fully in Part III, same-sex couples offer an exciting research possibility precisely because state variation among the *possibility* of couples’ marrying helps control for this selection bias (albeit in a way that I think unfairly compromises individuals’ civil rights).

More generally, it is difficult to determine how much work legal incentives, relative to gender norms, play in couples’ decisions to specialize; again, as discussed below, one key benefit of the marriage equation framework is that it can help disaggregate these effects. That said, it seems clear that legal rights do play a role in many decisions made by couples. Since individual health insurance plans are often prohibitively expensive, access to employer-sponsored health care benefits through marriage can be a key factor in permitting one adult in a family to stay home. While few couples choose whether to marry purely based on tax planning, the potential marriage benefits and penalties are widely

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151. See, e.g., Niko Matouschek & Imram Rasul, *The Economics of the Marriage Contract: Theories and Evidence*, 51 J.L. & ECON. 59 (2008); Elizabeth S. Scott, *Marital Commitment and the Legal Regulation of Divorce*, in *THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE* 35 (Antony W. Dnes & Robert Rowthorn eds., 2002); see also, e.g., Jeanne A. Batalova & Philip N. Cohen, *Premarital Cohabitation and Housework: Couples in Cross-National Perspective*, 64 J. MARRIAGE & FAM. 743 (2002) (comparing division of labor among cohabiting couples in twenty-two countries); Teresa Ciabattari, *Cohabitation and Housework: The Effects of Marital Intentions*, 66 J. MARRIAGE & FAM. 118 (2004) (analyzing effect of marital intentions among cohabitators on division of housework).

152. See, e.g., Julie Brines & Kara Joyner, *The Ties that Bind: Principles of Cohesion in Cohabitation and Marriage*, 64 AM. SOC. REV. 333 (1999).

discussed.<sup>153</sup> So are the potential trade-offs between paying for childcare to earn a second (taxable) income versus the (nontaxable imputed value of) staying home.<sup>154</sup> Basic retirement planning typically helps couples understand social security spousal benefits, as well as ways in which some couples with disparate earnings may maximize benefits by receiving sequentially both spousal benefits and primary benefits.<sup>155</sup> Even legal rights that one might assume were much less well known have been shown to have an effect on decision-making. For example, several studies have found that couples have sufficient awareness of divorce law such that changes in the substantive law—such as greater or lesser protections for a dependent spouse—affects bargaining between spouses and the willingness to invest in marriage-specific capital during the marriage itself.<sup>156</sup>

In fact, to the extent that individuals make assumptions about legal rights associated with marriage, they may well assume that the law provides *more* protection to dependent spouses than it actually does—and thus these misconceptions might “over-push” couples to specialize. For example, practitioners report that despite reforms to alimony made more than a generation ago, it is still quite common for individuals to believe that *all* women (and *only* women) receive alimony upon divorce.<sup>157</sup> In

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153. See, e.g., Donald E. Hodson, *Marriage Tax Penalty*, HITCHED, <http://www.hitchedmag.com/article.php?id=508> (last visited Feb. 18, 2012) (“[I]f you both earn enough to be taxed at 25% . . . you suffer a ‘penalty.’ . . . The flip side to the marriage penalty is the marriage tax bonus. You are eligible for the tax bonus when only one of you is employed.”); William Perez, *Getting Married and Taxes*, ABOUT.COM, [http://taxes.about.com/od/taxplanning/qt/marriage\\_tax.htm](http://taxes.about.com/od/taxplanning/qt/marriage_tax.htm) (last visited Feb. 18, 2012) (“Strictly from a tax perspective, getting married makes the most sense when one spouse earns income and the other spouse doesn’t earn income. . . . [And] staying single makes the most sense when both life-partners earn income.”).

154. See, e.g., Alan Marc Feigenbaum, *Keep Working or Stay at Home with the Kids?*, INVESTOPEDIA (Aug. 21, 2010), [http://www.investopedia.com/articles/pf/07/cut\\_an\\_income.asp#axzz1ZAoDa2vH](http://www.investopedia.com/articles/pf/07/cut_an_income.asp#axzz1ZAoDa2vH).

155. See, e.g., Jonathan Pond, *4 Tips for Boosting Your Social Security Benefits*, AARP (Aug. 13, 2010), [http://www.aarp.org/work/social-security/info-08-2010/4-Tips-for-Boosting-Your-Social-Security-Benefits.html?CMP=KNC-360I-GOOGLE-WOR-SOC&HBX\\_PK=spousal\\_benefit&utm\\_source=Google&utm\\_medium=cpc&utm\\_term=spousal%2Bbenefit&utm\\_campaign=G\\_Work&360cid=SI\\_162609901\\_6446871421\\_1](http://www.aarp.org/work/social-security/info-08-2010/4-Tips-for-Boosting-Your-Social-Security-Benefits.html?CMP=KNC-360I-GOOGLE-WOR-SOC&HBX_PK=spousal_benefit&utm_source=Google&utm_medium=cpc&utm_term=spousal%2Bbenefit&utm_campaign=G_Work&360cid=SI_162609901_6446871421_1); Dana Anspach, *Key Things to Know about the Social Security Spouse Benefit*, ABOUT.COM, <http://moneyover55.about.com/od/socialsecuritybenefits/a/socialsecurityspousebenefit.htm> (last visited Feb. 18, 2012).

156. See, e.g., Betsey Stevenson, *The Impact of Divorce Laws on Marriage-Specific Capital*, 25 J. LAB. ECON. 75 (2007) (collecting and reviewing studies).

157. Practitioners, both supportive and opposed to generous alimony provisions, identify these as common misconceptions. See, e.g., Patricia M. Barbarito, *Is It True That You Are Automatically Entitled to Receive Alimony for a Percentage of the Number of Years You Were Married?*, DIVORCE MAGAZINE.COM, <http://www.divorcemag.com/NJ/faq/legalbarbarito.html> (last visited Feb. 18, 2012) (“Clients have told me (with great conviction) over the years that: only men pay alimony (a myth); all women are entitled to alimony (also a myth); and a cheating spouse always pays alimony (to the great

reality, only about 15 percent of divorces include alimony or maintenance awards; moreover, these are often for only relatively short periods of time and are frequently difficult to enforce.<sup>158</sup>

There are some compelling reasons why marriage and related benefits law should offer protection to dependent spouses who subordinate, or forego entirely, their earning potential to meet domestic responsibilities. My point here is simply to note that in myriad ways, the law of marriage—although now sex-neutral—continues to encourage spouses to specialize into breadwinning and caretaking roles. And, as the next subpart details, most different-sex couples who choose to specialize do so along traditional gendered lines.

### C. A Stalled Revolution

The separate spheres ideology characterized women's place as in the home and men's as in the workplace. As described in Part II.A above, during the 1960s and 1970s, the sex-specific aspects of family law that enforced these roles were held to be unconstitutional, and new laws were enacted that outlawed sex discrimination in employment. Subsequent to these changes, there has been a dramatic growth in women's employment.

Women now typically share breadwinning responsibility. In 1960, only 27% of married women with children under eighteen participated in the paid labor force;<sup>159</sup> by 1970, that figure had already climbed to almost 40%;<sup>160</sup> and by 2008, it was just under 70%.<sup>161</sup> In 1970, working wives

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disappointment of many, not true!).""); *Common Misconceptions About Family Law*, ILLINOIS LEGAL AID, <http://www.illinoislegalaid.org/index.cfm?fuseaction=home.printvideotranscript&webcastxmlfile=archive3407.xml&contentID=3407> (last updated Nov. 2004) ("A lot of people believe that women will always get maintenance or always get alimony . . . or [will say] I'm a man [so] I can't get alimony or maintenance."); Aaron Dishon, *Spousal Support FAQ*, END SPOUSAL SUPPORT, <http://www.endspousalsupport.com/spousal-support-faq> (last visited Feb. 18, 2012) ("Q[uestion]: Do all divorces or separations involve spousal support? [Answer]: No, this is a common misconception.").

158. See, e.g., Constance L. Shehan et al., *Alimony: An Anomaly in Family Social Science*, 51 FAM. REL. 308, 308, 310, 312 (2002). See also *infra* Part II.D (discussing contemporary alimony policy and practice).

159. TRANSIT COOPERATIVE RESEARCH PROGRAM, TRANSIT MARKETS OF THE FUTURE: THE CHALLENGE OF CHANGE 76 (1998) ("In 1986, more than 61 percent of married women with children under 18 worked outside the home—compared with only 27 percent in 1960."); see also KARINE MOE & DIANNA SHANDY, GLASS CEILINGS & 100-HOUR COUPLES: WHAT THE OPT-OUT PHENOMENON CAN TEACH US ABOUT WORK AND FAMILY 16 fig.2 (2010) (graph showing in 1960 approximately 27% of married women with children were in labor force).

160. U.S. BUREAU OF THE CENSUS, 2008 STATISTICAL ABSTRACT OF THE UNITED STATES 380 tbl.580 (2008), available at <http://www.census.gov/prod/2007pubs/08abstract/labor.pdf> (39.7% of all married women with children were in labor force in 1970).

161. U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK 15 tbl.6 (2009) [hereinafter DATABOOK 2009], available at <http://www.bls.gov/cps/wlf-databook-2009.pdf>.

contributed 27% of their families' total incomes; by 2007, that figure had risen to 36%.<sup>162</sup> More strikingly, in 2007, 26% of wives earned more than their husbands.<sup>163</sup> The recession of 2008–2009 compounded this trend, as more men than women lost jobs.<sup>164</sup>

Although married women's participation in the labor force has increased markedly, they still perform far more housework than married men. In 1965, married women spent about seven times as many hours as their husbands on housework; now married women spend about twice as much time as their husbands on housework.<sup>165</sup> A significant gap exists even when both spouses have paid employment. For example, recent studies assert that when both spouses work full-time, the wife still typically does twenty-eight hours of housework while the husband does just over sixteen hours per week.<sup>166</sup> The kind of housework varies as well; women more typically do the cleaning, cooking, and laundry while men more typically do more sporadic jobs such as house maintenance and lawn mowing.<sup>167</sup> Thus, women perform more domestic work and the work that they do has less flexibility in terms of scheduling. Women working full time also still generally do more childcare than their husbands, although some recent studies suggest that this imbalance is narrowing considerably,

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The rise in married mothers' labor participation, combined with a rise in single-parent headed families, means that only one in five families consists of the traditional male breadwinner, female homemaker structure. See Press Release, U.S. Bureau of Labor Statistics, Employment Characteristics of Families—2010 tbl.2 (Mar. 24, 2011), available at <http://www.bls.gov/news.release/pdf/famee.pdf>.

162. DATABOOK 2009, *supra* note 161, at 2. Other estimates are even higher. See, e.g., Heather Boushey, *The New Breadwinners*, in THE SHRIVER REPORT: A WOMAN'S NATION CHANGES EVERYTHING 31, 36 (2009), available at [http://www.americanprogress.org/issues/2009/10/pdf/awn/a\\_womans\\_nation.pdf](http://www.americanprogress.org/issues/2009/10/pdf/awn/a_womans_nation.pdf) (married mothers contribute on average 42.2% of families' total incomes).

163. DATABOOK 2009, *supra* note 161, at 2. Because of the significant number of households headed by a single parent, nearly 40% of mothers are the primary breadwinners for their families. Boushey, *supra* note 162, at 32.

164. *Id.* at 33 (men accounted for three out of every four jobs lost in the recession).

165. See Suzanne M. Bianchi & Sara B. Raley, *Time Allocation in Families*, in WORK, FAMILY, HEALTH, AND WELL-BEING 19, 30 tbl.2.5 (Bianchi et al. eds., 2005); see also Mylène Lachance-Grzela & Geneviève Bouchard, *Why Do Women Do the Lion's Share of Housework? A Decade of Research*, 63 SEX ROLES 767, 768 (2010) (collecting studies).

166. Michael Kimmel, *Has a Man's World Become a Woman's Nation?*, in THE SHRIVER REPORT, A WOMAN'S NATION CHANGES EVERYTHING 323, 348, available at [http://www.americanprogress.org/issues/2009/10/pdf/awn/a\\_womans\\_nation.pdf](http://www.americanprogress.org/issues/2009/10/pdf/awn/a_womans_nation.pdf) (citing Lisa Belkin, *When Mom and Dad Share it All*, N.Y. TIMES MAG., June 15, 2008, at 47); see also, e.g., Sharon Bartley et al., *Husbands and Wives in Dual-Earner Marriages: Decision-Making, Gender Role Attitudes, Division of Household Labor, and Equity*, 37 MARRIAGE & FAM. REV. 69, 87 (2005) ("[H]usbands and wives in these dual-earner families appear to divide tasks along traditional gendered lines. . . . Husbands performed an average of 20+ hours of household labor per week, whereas wives performed an average of 34 hours of household labor per week.").

167. See Solomon et al., *supra* note 19, at 566 tbl.1.

particularly among younger men.<sup>168</sup> Working women are also more likely than their working husbands to take on responsibility for care of elderly family members.<sup>169</sup> These factors collectively give rise to the reality that Arlie Hochschild famously described as the “second shift.”<sup>170</sup> Women work significant hours outside the home and then return to significant childcare and housework responsibilities at home. It is important to note, however, that men tend to spend more hours in their paid employment, so some studies suggest that on average the total number of hours “worked” by each spouse may be close to equivalent.<sup>171</sup>

Labor force participation and housework division are only part of the story. Working mothers are far more likely than working fathers to miss work for children’s illnesses or when childcare arrangements break down.<sup>172</sup> Working mothers are also far more likely than fathers to forego or transition out of time-intensive or travel-intensive careers when children are born.<sup>173</sup> They are more likely to quit when required to work extensive overtime and/or when their spouses are required to work extensive overtime.<sup>174</sup> Women are also far more likely than men to work part-time;<sup>175</sup> this is particularly common for married mothers.<sup>176</sup>

168. See, e.g., Kimmel, *supra* note 166, at 350–51 (reporting that men on average spend 3 hours a day on work days with children under the age of thirteen and women on average spend 3.8 hours); see also generally KATHLEEN GERSON, *THE UNFINISHED REVOLUTION: HOW A NEW GENERATION IS RESHAPING FAMILY, WORK, AND GENDER IN AMERICA* (2010) (discussing widely shared aspirations among younger Americans to share work and domestic responsibilities more equally, but also documenting tensions and resistance); cf. SUZANNE M. BIANCHI ET AL., *CHANGING RHYTHMS OF AMERICAN FAMILY LIFE* 69 tbl.4.2 (2006) (reporting based on data from 2000 that married mothers spend almost 19 hours per week in primary and secondary care and that married fathers spend almost nine).

169. See, e.g., RICHARD W. JOHNSON & ANTHONY T. LO SASSO, *THE TRADE-OFF BETWEEN HOURS OF PAID EMPLOYMENT AND TIME ASSISTANCE TO ELDERLY PARENTS AT MIDLIFE* 20, 33 tbl.1, 34 tbl.2 (2000), available at [http://www.urban.org/UploadedPDF/elderly\\_parents.pdf](http://www.urban.org/UploadedPDF/elderly_parents.pdf) (finding 25.5% of women and 13.6% of men in paid employment provided significant time help to elderly parents or parents-in-law).

170. ARLIE HOCHSCHILD WITH ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989).

171. See, e.g., BIANCHI ET AL., *supra* note 168, at 115.

172. See, e.g., MOE & SHANDY, *supra* note 159 at 63 (citing a study finding that two-thirds of “highly educated, employed” women report taking time off to take a child to a doctor while only 7% of their husbands had).

173. See *id.* at 52–58.

174. Youngjoo Cha, *Reinforcing Separate Spheres: The Effect of Spousal Overwork on Men’s and Women’s Employment in Dual-Earner Households*, 75 AM. SOC. REV. 303, 313–26 (2010); see also generally MOE & SHANDY, *supra* note 159 (describing phenomenon they dub the “100-hour couple” where extensive overtime demands on both members of a couple lead to the wife dropping out of the labor force).

175. DATABOOK 2009, *supra* note 161, at 70–72 tbl.20 (24.6% of employed women usually worked part-time compared with 11.1% of employed men in 2008).

176. MOE & SHANDY, *supra* note 159, at 62.



In the United States, a significant gender gap in the allocation of domestic responsibilities within marriage exists across racial-ethnic categories. However, the size of the gap varies by racial-ethnic categories, with black married couples typically displaying the least inequality. For example, one recent study looking at the gap in “core housework” found it ranged from 5.54 for Hispanic couples (that is, that Hispanic wives did 5-and-half times more “core housework” than their husbands), to 4.12 for Asian couples, 3.16 for white couples, and “only” 2.79 for black couples.<sup>177</sup> Researchers surmise that the relatively greater equality in black couples likely reflects the greater earning power of black women relative to black men, racial-ethnic differences in “doing gender,” or the prevalence of egalitarian norms.<sup>178</sup> For all racial and ethnic groups, class may likewise be a significant variable, as several studies have found that as women’s absolute earning power increases they may “out-source” greater amounts of domestic work thus reducing the disparity between husbands and wives (albeit to a domestic workforce that is overwhelming female, and also disproportionately minority).<sup>179</sup> The availability of free childcare from extended family (e.g., a grandmother who cares for children while parents work) may also vary according to class, race, and ethnicity, and may likewise play a key role in how couples allocate domestic responsibilities.<sup>180</sup>

Since law no longer mandates that men and women play distinct roles within marriage, social scientists have tried to measure and explain drivers of this persistent gender imbalance. One prominent theory, initially propounded by Gary Becker, focuses on the efficiencies provided by specialization. Becker argued that households, like companies, benefit from a certain level of specialization.<sup>181</sup> Both work in the paid workforce and work inside the home require skills that can be developed through experience, and the family unit will benefit collectively if one member of the household develops expertise in the former and a separate member of

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177. Liana C. Sayer & Leigh Fine, *Racial-Ethnic Differences in U.S. Married Women’s and Men’s Housework*, 101 SOC. INDICATORS RES. 259, 262 tbl.1 (2011).

178. See *id.* at 262–64; Daphne John & Beth Anne Shelton, *The Production of Gender Among Black and White Women and Men: The Case of Household Labor*, 36 SEX ROLES 171, 188–90 (1997); Terri L. Orbuch & Sandra L. Eyster, *Division of Household Labor Among Black Couples and White Couples*, 76 SOC. FORCES 301, 325–26 (1997).

179. See, e.g., Sanjiv Gupta, *Her Money, Her Time: Women’s Earnings and Their Housework Hours*, 35 SOC. SCI. RES. 975, 995–96 (2006); Jan Paul Heisig, *Who Does More Housework: Rich or Poor? A Comparison of 33 Countries*, 76 AM. SOC. REV. 74 (2011).

180. My thanks to Kimberly Richman for making this point.

181. GARY S. BECKER, A TREATISE ON THE FAMILY 30–53 (enlarged ed. 1991).

the household develops expertise in the latter.<sup>182</sup> Conversely, significant domestic responsibilities take energy and time away from paid employment and can therefore reduce success in that sphere.<sup>183</sup> Marriage law offers (limited) protection to the dependent spouse against abandonment by the provider spouse.<sup>184</sup> Becker initially suggested that women were innately better suited to take on responsibilities for childcare and for housework due to the biological realities of pregnancy, childbirth, and breastfeeding, and that (different-sex) marriages were a societal solution to bring together the “complementarity” of male and female skills into an efficient familial unit.<sup>185</sup> In later work, he backed somewhat away from this conclusion to suggest that wage discrimination and other factors, rather than simply “innate” differences, could play a significant role in pushing women to specialize in unpaid work.<sup>186</sup> Nonetheless, his basic premise—that it was maximally efficient for the woman to specialize in domestic work and the man to specialize in breadwinning—remained unchanged. These ideas retain currency. In 2003, *New York Times* writer Lisa Belkin popularized the concept of an “opt-out revolution” of highly educated women rejecting lucrative and often prestigious employment in favor of domestic responsibilities and the collective good of their family units.<sup>187</sup> The scope of this “revolution,” as well as the extent to which it is dictated by inflexible work/family policies, has been hotly contested.<sup>188</sup>

In fact, as women entered the paid marketplace in increasing numbers, the basic premises of specialization were arguably undermined. If both men and women were spending significant hours performing paid work, why did women still tend to do the bulk of the housework and caregiving responsibilities? Economists and other social scientists developed a group

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182. *Id.*

183. *Id.* See also Joni Hersch, *Home Production and Wages: Evidence from the American Time Use Survey*, 7 REV. ECON. HOUSEHOLD 159 (2009) (demonstrating that housework has a negative relation with wages for both women and men).

184. BECKER, *supra* note 181, at 30.

185. *Id.* at 37–38.

186. *Id.* at 54–79. For a recent critique of specialization in the context of family law, see Katharine K. Baker, *Supporting Children, Balancing Lives*, 34 PEPP. L. REV. 359 (2006).

187. See Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003, <http://www.nytimes.com/2003/10/26/magazine/26WOMEN.html?pagewanted=all>.

188. See, e.g., Heather Boushey, “Opting Out?” *The Effect of Children on Women’s Employment in the United States*, FEMINIST ECON., Jan. 2008, at 1 (concluding that there is little empirical support for claims of a widespread opt-out phenomena); Claudia Goldin, *The Quiet Revolution that Transformed Women’s Employment, Education, and Family*, AM. ECON. REV., May 2006, at 1 (similar); JOAN C. WILLIAMS ET AL., “OPT-OUT” OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT (2006), available at <http://www.worklifelaw.org/pubs/OptOutPushedOut.pdf> (analyzing data and the extent to which inflexible policies contribute to women dropping out of the workplace).

of theories stemming from economic exchange principles to help explain this phenomenon. These begin with the premise that housework is unpleasant and that, even within a marriage, individuals will bargain with their spouses to do less of it if they can.<sup>189</sup> Therefore, an individual who earns more than his spouse will bargain to do less housework, using his extra earning power as the leverage in the implicit or explicit deal-making. Unlike Becker's specialization theories, these exchange theories are typically presented as sex-neutral. Whichever member of the couple earns more should be able to use this leverage to perform less housework.

In general, men are more likely to have the power in the relationship to "bargain out" of housework because they earn more on average than women. Despite guarantees of equal treatment in employment law, a significant wage gap between men and women persists. Women who work full-time earn only about 80 percent of what men who work full-time do.<sup>190</sup> When the comparison includes women who work part-time and/or part-year the wage gap widens considerably: a study of workers in their prime earning years found that women earn just thirty-eight cents for every dollar men earn.<sup>191</sup> And women tend to marry men a little older than they.<sup>192</sup> This means that when children are born, men tend to be further along in their careers and thus earning more than their wives; accordingly, if one member of the family is going to curtail work to take on additional domestic responsibilities, it generally makes "sense" for it to be the woman.<sup>193</sup> A similar theory focuses on time allocation, suggesting that the spouse that spends less time in the paid workforce (again, in most families, the woman) will typically perform a greater percentage of the housework; often this will correlate with the economic exchange theory, but not always.<sup>194</sup>

But even controlling for such realities, which themselves owe much to the historic separate spheres ideology, economic theories do not

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189. See, e.g., Sarah Thebaud, *Masculinity, Bargaining, and Breadwinning: Understanding Men's Housework in the Cultural Context of Paid Work*, 24 GENDER & SOC'Y 330, 332 (2010) (describing these economic exchange based theories).

190. There are numerous explanations for this wage gap. See generally Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 714-44 (2000) (collecting and discussing studies exploring various theories, including human capital factors, individual choice, and statistical discrimination). Marriage tends to enhance men's salaries while it has "a neutral or modestly negative effect" on women's. See *id.* at 726.

191. Heidi Hartmann et al., *How Much Progress in Closing the Long-Term Earnings Gap?*, in THE DECLINING SIGNIFICANCE OF GENDER? 125, 131 (Francine D. Blau et al. eds., 2006).

192. See RHONA MAHONY, KIDDING OURSELVES: BREADWINNING, BABIES, AND BARGAINING POWER 140-42 (1995).

193. See *id.* at 140-41.

194. See, e.g., Lachance-Grzela & Bouchard, *supra* note 165, at 772 (collecting studies).

adequately explain the housework imbalance in some families. Women who earn more than their husbands often still perform a greater share of the housework than their husbands—and, even more surprising, several studies have found that as the gap in their earnings widens, the gap in the housework split also tends to widen.<sup>195</sup> In other words, these studies suggest that a woman who far out-earns her husband will tend to do a considerably larger share of the housework than a woman who earns about the same amount as her husband. These findings have led to alternative theories regarding the division of housework that explicitly focus on gender norms. Social scientists speculate that couples in which the woman earns more than the man often “correct” for the “gender deviance” by embracing a traditional gendered split regarding household responsibilities.<sup>196</sup>

Gender based views help shape the division of responsibility regardless of who earns more. Studies have found that couples who hold strongly traditional ideas about gender roles—particularly if the male in the couple does so—are more likely to assign the bulk of housework or child work to the wife, regardless of the split of income earning.<sup>197</sup> Other researchers have found fathers with “feminist attitudes” perform significantly more childcare than fathers with more traditional attitudes.<sup>198</sup> In short, traditional expectations regarding appropriate gender roles for men and women continue to push women to do a greater share of housework and childcare than pure economic theory would predict. Interestingly, some research suggests that couples internalize these societal expectations so significantly that very unequal divisions of responsibilities—and ones that are clearly not inline with the balanced exchange that economic theory

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195. See, e.g., Michael Bittman et al., *When Does Gender Trump Money? Bargaining and Time in Household Work*, 109 AM. J. SOCIOLOGY 186 (2003); Julie Brines, *Economic Dependency, Gender, and the Division of Labor at Home*, 100 AM. J. SOCIOLOGY 652 (1994); Theodore N. Greenstein, *Economic Dependence, Gender, and the Division of Labor in the Home: A Replication and Extension*, 62 J. MARRIAGE & FAM. 322 (2000); Thebaud, *supra* note 189. It may be that this phenomenon is receding. See Stephanie Coontz, *The M.R.S. and the Ph.D.*, N.Y. TIMES, Feb. 12, 2012, at SR1 (characterizing these findings as “outdated” and referencing a forthcoming paper by Oriel Sullivan, to be published by the Council on Contemporary Families, that concludes that the higher a woman’s educational resources and earning potential relative to her husband, the more help with housework she gets from her partner).

196. The phrase “gender deviance” is derived from Greenstein, *supra* note 195, at 332, 325–26, 332–34 (discussing “deviant” gender roles and “deviance neutralization” regarding housework allocation).

197. See, e.g., Yoav Lavee & Ruth Katz, *Division of Labor, Perceived Fairness, and Marital Quality: The Effect of Gender Ideology*, 64 J. MARRIAGE & FAM. 27 (2002).

198. See, e.g., Charlotte J. Patterson et al., *Division of Labor Among Lesbian and Heterosexual Parenting Couples: Correlates of Specialized Versus Shared Patterns*, 11 J. ADULT DEV. 179, 180 (2004) (collecting studies).

suggests “should” happen—are nevertheless perceived by both members of the household as “fair.”<sup>199</sup>

As discussed above, law no longer mandates separate spheres for men and women. Therefore, it is common to characterize the pervasiveness and persistence of gendered divisions of labor as the result of individual “choices.” This conclusion is arguably false in several respects. First, as discussed in Part II.B, substantive marriage and benefits law still encourages specialization. Second, as noted above, both men and women face significant pressure to conform to traditional gender norms within their relationship. Third, gender norms may also differentially affect how employers respond to caretaking obligations by employees. As Joan Williams and others have demonstrated, employers may assume, for example, that the mother of a young child would not want a promotion with significant travel responsibilities, or penalize a male employee who seeks to play a greater caregiving role than society expects.<sup>200</sup> Only recently have courts begun to recognize such differential treatment by employers as a form of sex discrimination that may be challenged under employment discrimination statutes.<sup>201</sup> More generally, as discussed above, existing employment law offers quite limited support for employees with caretaking responsibilities.<sup>202</sup> Thus, a couple who prefers to share wage-earning and domestic responsibilities relatively equally but finds this difficult because of inflexible workplace rules may gravitate towards specialization as a second-best solution.

Whatever the mix of causes, notwithstanding more than thirty years of sex-neutral family law and employment law, most couples continue to divide responsibilities along distinctly gendered lines. And, strikingly, many state that they prefer it. For example, a recent, large-scale survey, found that a slim majority of Americans stated that they believed that it was best for society for men to work outside the home and women to remain home.<sup>203</sup> While some studies suggest ongoing movement towards a

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199. See, e.g., Michael Braun et al., *Perceived Equity in the Gendered Division of Household Labor*, 70 J. MARRIAGE & FAM. 1145 (2008).

200. See generally Joan C. Williams & Stephanie Bornstein, *The Evolution of “FReD”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311 (2008) (collecting and discussing recent cases and EEOC guidance recognizing that employment decisions based on such stereotypes may violate Title VII).

201. See, e.g., *id.* at 1335–41 (discussing recent cases).

202. See *supra* text accompanying notes 146–50.

203. John Halpin & Ruy Teixeira, *Battle of the Sexes Gives Way to Negotiations*, in THE SHRIVER REPORT: A WOMAN’S NATION CHANGES EVERYTHING 395, 396, available at [http://www.americanprogress.org/issues/2009/10/pdf/awn/a\\_womans\\_nation.pdf](http://www.americanprogress.org/issues/2009/10/pdf/awn/a_womans_nation.pdf).

normative preference for sharing responsibilities more equally, others suggest that this egalitarian preference has leveled off or even receded.<sup>204</sup>

#### *D. Conflicting Incentives in the Modern Marriage Equation*

The marriage equation framework helps organize and analyze the now conflicting incentives that shape how couples choose to allocate responsibility for caretaking and breadwinning. The efficacy of policy design depends on understanding these interactions. A nascent body of social science research uses cross-national comparisons, reflecting different policy choices in key aspects of family and employment law, in conjunction with the kind of “micro” factors discussed above, to better understand the choices couples make.<sup>205</sup> The challenge, however, is properly identifying, and ideally distilling, the crosscurrents at play.<sup>206</sup>

Alimony reform can provide a particularly striking example of the way in which the various factors of the marriage equation interact. Before the reforms of the 1970s, in many states alimony was sex-specific. It was available upon divorce to wives, not husbands, and generally limited to “innocent” wives whose divorces were granted on the basis of a finding that their husbands were at fault. It continued the sex-specific requirement that husbands provide support to their wives within marriage—alimony awards generally continued until either party’s death or until the wife’s marriage to a new husband who then assumed the support responsibility.<sup>207</sup> Importantly, alimony was far from sufficient to protect divorced women’s interests. It was actually awarded relatively rarely; offered no recourse to a woman who provided “cause” for the divorce; and often offered inadequate support even when awarded.<sup>208</sup> Certainly, the prior system needed reform.

In the 1970s, alimony changed in two respects. First, after *Orr v. Orr*,<sup>209</sup> alimony could no longer be limited to dependent wives; the

204. Arland Thornton & Linda Young-DeMarco, *Four Decades of Trends in Attitudes Toward Family Issues in the United States: The 1960s Through the 1990s*, 63 J. MARRIAGE & FAM. 1009, 1014, 1032 (2001).

205. See Lachance-Grzela & Bouchard, *supra* note 165, at 776–77 (collecting studies).

206. Cf. Scott Coltrane, *Gender Theory and Household Labor*, 63 SEX ROLES 791 (2010) (arguing that micro- / macro-research needs to better incorporate gender theory).

207. On the history of alimony, see, e.g., Kisthardt, *supra* note 54.

208. See, e.g., LENORE J. WEITZMANN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 144, 457 (1985) (citing mid-1970s census reports documenting that 14% of women received alimony); Oldham, *supra* note 135, at 429 (citing studies reporting alimony, or alimony or property settlement, rates ranging from 9.3% to 25% in various periods during the late nineteenth- to mid-twentieth centuries).

209. 440 U.S. 268 (1979).

evolving understanding of equal protection guarantees mandated that it be made available to dependent spouses of either sex.<sup>210</sup> But rather than simply making alimony sex-neutral, many states followed the Uniform Marriage and Divorce Act (UMDA) (originally promulgated in 1970 and amended in 1971 and 1973) in renaming alimony “maintenance,” and replacing the traditional understanding of alimony as compensation for marital fault or an ongoing support obligation with a needs-based assessment which limited availability of maintenance to spouses unable to support themselves through employment.<sup>211</sup> Maintenance awards are usually temporary, rather than open-ended, designed simply to permit a spouse who has not been working to develop employable skills.<sup>212</sup> Some states went even further than the UMDA, adopting statutory time limits on maintenance for able-bodied spouses except in instances where a child is significantly disabled or incapacitated, and/or prohibitions against maintenance awards in relatively short marriages.<sup>213</sup> In states that adopted the UMDA or similar provisions, the focus on demonstrated need means that maintenance is typically unavailable in divorces where both members of the couple participated in paid work during the marriage, even if the

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210. *Id.*

211. See Uniform Marriage and Divorce Act, § 308, 9A U.L.A. 347–48 (authorizing awards only upon a showing that a spouse lacks “sufficient property to provide for his reasonable needs” and “is unable to support himself through employment” or the custodian of a child whose “condition or circumstances” make it “appropriate” that the custodian not be required to seek employment outside the home); Uniform Commercial Code Locator, Uniform Matrimonial and Family Laws Locator, available at <http://www.law.cornell.edu/uniform/vol9.html#mardv> (identifying Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington as states that adopted the UMDA). Other states that are not included on this list adopted provisions that are quite similar to—and sometimes more restrictive than—the UMDA. See, e.g., IND. CODE ANN. 31-15-7-2 (West 2008) (basically adopting UMDA standard but adding three year time-limit for many claims); TEX. CODE ANN. § 8.051 (limiting availability in marriages of less than ten years). Some UMDA states subsequently amended their statutes to expand grounds that could justify awards of maintenance. See, e.g., ARIZ. REV. STAT. ANN. § 25-319.A (permitting maintenance upon showing spouse contributed to educational opportunities of other spouse or in marriage of long duration).

212. See, e.g., Tonya L. Brito, *Spousal Support Takes on the Mommy Track: Why the ALI Proposal is Good for Working Mothers*, 8 DUKE J. GENDER L. & POL’Y 151, 155 (2001) (“Temporary maintenance awards have become the norm in family law.”); Oldham, *supra* note 135, at 431 (“[A] number of empirical studies from the late 1960s through the 1980s confirm the trend of less frequent awards of spousal support, as well as a growing tendency towards support for a fixed term, as opposed to support for an indefinite period.”).

213. See, e.g., IND. CODE ANN. 31-15-7-2 (West 2008) (permitting open-ended maintenance to be awarded only if a spouse is substantially “physically or mentally incapacitated” or a custodian of a child with a substantial “physical or mental incapacity”; and no more than three years of “rehabilitative” maintenance to support an able-bodied spouse preparing to reenter or expand paid labor force participation); TEX. FAM. CODE ANN. § 8.051 (generally prohibiting maintenance to able-bodied spouses not caring for a child with a significant disability if the marriage did not exceed ten years).

incomes were widely disparate. These reforms fit comfortably with the 1970s feminists' efforts to remake marriage as a union of "equals," and to a larger commitment to challenging so-called benevolent protections which were, as the Supreme Court observed, "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."<sup>214</sup> The reforms accorded with the move towards no-fault divorce which made it more difficult—and many felt conceptually troubling—to award alimony as a compensation for spousal misconduct,<sup>215</sup> although a significant number of states retained fault as a factor that could be considered in alimony awards.<sup>216</sup> These changes also interacted with a concurrent shift in most states away from title-based distribution of marital property, which typically resulted in most marital property being retained by the wage-earning husband, to equitable distribution.<sup>217</sup>

If gender roles had been restructured, and if other aspects of substantive marriage law that encourage specialization during the duration of the marriage had also been retooled, and particularly if other supports (such as publicly subsidized childcare, more generous parental leaves, or greater workplace flexibility) had been established, women might have begun to participate in paid work on an equal basis with their husbands and the changes in alimony might have been considered both successful and fair. But that did not happen. Rather, as discussed above, the modern marriage equation continues to encourage specialization within marriage, although it is now formally agnostic regarding which spouse plays which role. Due to the widespread persistence of gender norms, women continue to provide the bulk of caregiving within (different-sex) marriages. They are far more likely than men to drop out of the paid workforce entirely, to work part-time, or, even if working full-time, to prioritize caretaking over taking full advantage of their earning power.<sup>218</sup> Although equitable distribution of marital property can partially compensate for such realities,

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214. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

215. See, e.g., Kisthardt, *supra* note 54, at 68 ("With the advent of no-fault divorce, alimony lost its punitive rationale.").

216. See AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 48–51 (research conducted in 1996 concluded that states are divided approximately evenly on whether fault could be considered in alimony awards). The UMDA explicitly precludes consideration of fault in maintenance awards. See UMDA, § 308(b) (setting forth factors that courts should consider in setting a "just [amount] without regard to marital misconduct").

217. See, e.g., Oldham, *supra* note 135, at 427–29 (discussing historical roots of equitable distribution but observing "it was not until the 1970s and 1980s that a majority of noncommunity property states enacted equitable distribution statutes or confirmed during that period via judicial opinion that divorce courts had this power").

218. See *supra* Part II.C.



many divorcing couples have very little marital property; their greatest asset is often the primary wage earner's income.<sup>219</sup> Additionally, upon divorce, women are far more likely than men to be granted sole or primary physical custody of children, and accordingly family responsibilities continue to compromise their ability to maximize their wage-earning potential.<sup>220</sup> The combined effect of these various factors means that, not surprisingly, women's standard of living after divorce often falls dramatically, while men's typically declines modestly or even improves.<sup>221</sup>

Changing one aspect of the marriage equation (sex-based open-ended alimony eligibility) without changing others (gender norms that expect women to be primary caretakers and tax, benefit, and other substantive marriage laws that encourage specialization during marriage) upset the previous balance. Divorced women, as a group, are probably not worse off under the current regime than they would have been under the prior alimony regime.<sup>222</sup> But they did not benefit as much as they might have

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219. See, e.g., Oldham, *supra* note 135, at 433–34 (collecting empirical studies from the 1960s through 1980s finding many divorcing couples had little property but that trend toward dividing even unvested pension rights may change this analysis to some extent); WILLIAMS, *supra* note 147, at 121 (“[I]n the typical case, where a divorcing family has few assets, ‘equal shares’ often means that the wife receives an equal share of a nominal amount, or else receives an equal share of the family’s mortgage debt.”).

220. See, e.g., Douglas W. Allen & Margaret Brinig, *Do Joint Parenting Laws Make Any Difference?*, 8 J. EMP. L. STUDS. 304, 313 tbl.1 (2011) (finding even after Oregon enacted presumption of joint custody, mothers were awarded sole custody 59% of the time, fathers were awarded sole custody 10% of the time, with the remainder ordering joint custody); Suzanne Reynolds et al., *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629, 1669 (2007) (study of North Carolina divorces finding mothers were awarded or obtained through mediation primary custody in 232 out of 323 cases, or 72%, of cases, fathers were awarded primary custody in 41 out of 323 cases, or 13% of cases, with the remainder joint custody). The same study found mothers were more likely to obtain primary custody in mediation than in litigation or settlement. See *id.*

221. In 1985, Lenore Weitzmann received widespread attention for studies that showed that women experience a 73% decrease in their standard of living after divorce and men experience a 42% gain. See WEITZMANN, *supra* note 208, at 323. Other scholars questioned the magnitude of her findings but have generally confirmed that women’s standard of living declines far more than men’s after a divorce. See, e.g., Patricia A. McManus & Thomas A. DiPrete, *Losers and Winners: The Financial Consequences of Separation and Divorce for Men*, 66 AM. SOC. REV. 246, 246 (2001) (collecting studies showing mixed results on whether men’s standard of living improves or declines after divorce but concluding “[a] large body of research has established that marital disruption has a substantial negative impact on women’s standard of living, and that this impact is worse for women than for men”); *id.* at 265–66 (“[W]omen and children . . . overwhelmingly suffer serious declines in their material well-being in the aftermath of separation and divorce.”). This study found that the standard of living for men who had contributed 80% or more of pre-separation income in a marriage improved after divorce but that it declined somewhat for men who had been in dual-earner marriages. See *id.* at 266–67; cf. Avellar & Smock, *supra* note 141 (finding female cohabitators’ economic wellbeing declined far more than male cohabitators’ upon dissolution of the relationship).

222. See, e.g., Oldham, *supra* note 135, at 434–35 (“[I]t remains unclear whether it is better for a vulnerable spouse today to receive a property settlement and possibly spousal support for a definite term, compared to a somewhat more likely award of indefinite spousal support fifty years ago.”).

from other reform approaches that more accurately gauged, or accepted, the competing incentives embedded in the marriage equation. Notably, courts of last resort in several states that did not adopt maintenance statutes with time limits have recently reaffirmed that courts may appropriately provide open-ended alimony when couples with substantially different incomes divorce after a long marriage and the dependent spouse cannot be realistically retrained.<sup>223</sup> Some reform proposals go further. For example, in 2002, the American Law Institute (ALI) proposed a new standard for maintenance that moves away from the expectation that both spouses will participate in the paid marketplace during marriage. Instead, the standard would explicitly provide “compensation” for a dependent spouse’s “residual loss in earning capacity” due to providing a disproportionate share of caretaking, as well as any investment in the other spouse’s earning capacity.<sup>224</sup> This approach, like maintenance, is formally sex-neutral; unlike maintenance, it protects spouses (the vast majority of whom are women) who specialize in caretaking or who subordinate paid work opportunities to meet domestic needs during marriage. No state has yet adopted the ALI recommendations, and I am not arguing that the ALI approach is clearly superior to the current regime. My claim is far more modest: that assessment of the ALI approach, the current regime, or any other potential reform, must consider the interaction of all three factors in the marriage equation and the extent to which the combination of law and social norms continues to encourage women to drop out of the labor force or otherwise subordinate their earning power during marriage.<sup>225</sup>

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223. See, e.g., Oldham, *supra* note 135, at 432 n.88 (collecting cases).

224. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 5.03(1),(2)(b),(3)(a), 5.05 (2002). The ALI Principles rely heavily on a theory of alimony developed by ALI Reporter Ira Ellman. See Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1 (1989). The proposal has engendered a significant amount of commentary, some laudatory and some critical. See, e.g., Brito, *supra* note 212 (supporting the proposal on grounds it would create more predictable uniform rules and better protect parents who assume primary caregiving responsibilities); June Carbone, *The Futility of Coherence: The ALI’s Principles of the Law of Family Dissolution, Compensatory Spousal Payments*, 4 J.L. & FAM. STUD. 43, 43 (2002) (the proposal deserves “cautious support”); Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 IOWA L. REV. 1513 (2005) (arguing ALI approach improperly continues to see caretaking as a liability and that partnership model would be preferable); Katherine B. Silbaugh, *Money as Emotion in the Distribution of Wealth at Divorce*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 234 (Robin Wilson ed., 2006) (criticizing the proposal’s failure to consider non-financial aspects of marriage).

225. Assessment should also be sensitive to differences of class and race. Cf. Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481 (1994) (observing that black women receive alimony at far lower rates than white women and arguing that a

More generally, prominent commentators have recently described policy efforts to help (different-sex) families better balance work and family as “stalled”<sup>226</sup> and at an “impasse.”<sup>227</sup> To the extent that further reform is desirable, it is difficult to know where to put one’s efforts. In most different-sex families, economic exchange theories, efficiency gains from specialization, and gender norms will tend to reinforce each other. Additionally, as noted in Part II.B, the substantive law of marriage and related benefits likewise encourages specialization. Disentangling the relative significance of these myriad factors is quite difficult, but same-sex marriage offers the possibility to consider policy proposals from a fresh perspective.

### III. SAME-SEX COUPLES

Consider the quotation that opened this Article: “It never ceases to amaze me how many people will say to us, ‘So, who’s the woman, and who’s the man, in your marriage?’”<sup>228</sup> This statement helps crystallize the confluence of issues that this Article explores. First, it is important to note that it is easy to understand what Jason Shumaker means when he says “who’s the woman, and who’s the man” in the marriage. The studies discussed in Part II.C simply confirm what is common knowledge: Despite more than thirty years of formal equality in family law, the role of the “woman” and the role of the “man” within marriage remain clear. At the same time, the fact that this statement is made by a man who is actually married to another man highlights the challenge that same-sex marriage poses to these understandings. One or both husbands in the marriage may play the role of “woman” in the marriage—that is, perform caretaking functions—but in so doing he will be acting against gender norms. This can (at least theoretically) weaken the intertwined assumptions that caretaking is best performed by a woman and that it is an essential expression of femininity. Moreover, it is crucially important that these men are legally married under Massachusetts law. Whatever their inclinations might be about how best to allocate responsibilities for breadwinning and for caregiving, substantive laws and benefits of

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focus on alimony as a means of providing support for women after divorce may reinforce a hierarchy among women in which value depends on association with affluent, more typically white, men).

226. Michael Selmi, *The Work-Family Conflict: An Essay on Employers, Men and Responsibility*, 4 U. ST. THOMAS L.J. 573, 573–74 (2007).

227. Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 3, 17, 66 (2010).

228. Benoit Denizet-Lewis, *supra* note 1, at 35.

marriage will, at the margins at least, encourage specialization by one husband in income-producing work and one husband in domestic work rather than an equal split of those responsibilities. These effects may be confounded by societal understandings of what marriage “means.” In other words, marriage may itself spur one of the men to become the “woman” within the relationship.

As such choices are made not just by this couple but by the rapidly growing number of married same-sex couples, researchers will be able to develop a much richer understanding of the relative significance of gender norms and of the substantive laws of marriage on the way in which couples make these decisions.

#### *A. Challenging the “Last” Sex-Based Classification*

##### *1. Gender Norms in the Debate Over Same-Sex Marriage*

When same-sex couples first brought legal cases seeking the right to marry in the early 1970s, their claims (if successful) would have required modifications of those aspects of substantive marriage law that imposed distinct rights and responsibilities on husbands and on wives. Today, however, the formal legal import of the change sought—modification of the requirement that marriage be between a man and woman—requires only minimal reconsideration of substantive marriage law, since it is now sex-neutral in almost all respects. Nonetheless, just as in the debates over the ERA, supporters and opponents of same-sex marriage strategically claim and disclaim the connections implicit in the marriage equation.

In 1970, Jack Baker and Michael McConnell were the first gay couple in the United States to appeal a denial of a marriage license. Well aware of the controversy this would generate, they held a press conference before appearing at the clerk’s office in Minneapolis with a crowd of reporters. The story was news across the country, and the couple explicitly situated it as part of the larger debate over marriage. They characterized their objective as seeking recognition for their love—but also as a hope that “within five years we can turn the whole institution of marriage upside down.”<sup>229</sup> Similarly, Paul Barwick and John Singer, a couple who applied for a marriage license in Seattle the following year, stated that they sought, among other things, to “challenge mainstream definitions of marriage and

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229. David L. Chambers, *Couples: Marriage, Civil Union, and Domestic Partnership*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 281, 284 (John D’Emilio et al. eds., 2000).

the family.”<sup>230</sup> Both couples remember being asked repeatedly “which one was the wife” and being pleased to emphasize that they were simply two men who sought to wed.<sup>231</sup> In 1971, when *Look*, a widely read general circulation magazine, devoted an issue to the changing American family, it included Baker and McConnell as “‘Married’ homosexuals” along with profiles of “The Young Unmarrieds” and “The Executive Mother.”<sup>232</sup>

Courts in Minnesota and Washington quickly disposed of the gay couples’ claims (as did a court in Kentucky faced with a claim brought by a lesbian couple), relying primarily on conclusory statements that marriage was the union of a man and a woman.<sup>233</sup> But the possibility—or, in many minds, the threat—of gay marriage became intertwined with larger questions of gender roles within marriage as part of the increasingly virulent debates over the ERA.<sup>234</sup> Phyllis Schlafly and other opponents of the ERA seized on academic musings that suggested the ERA might lead to legalization of gay marriage to bolster the case against the ERA.<sup>235</sup> Schlafly explicitly linked recognition of gay rights to the traditional gender-based assumption that husbands support their families, claiming that enactment of the ERA would offer benefits only to “the offbeat and

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230. *Id.*; see also DONN TEAL, *THE GAY MILITANTS* 291–93 (1971) (discussing varying views on the appropriateness of seeking to expand marriage rights for gays and lesbians because of the historically patriarchal structure of marriage).

231. Chambers, *supra* note 229, at 286. Likewise, when Tracy Knight attempted to wed Marjorie Ruth Jones in Kentucky, the county attorney “became confused during his questioning about which of the two was to be the ‘wife’ and who was the ‘husband.’” TEAL, *supra* note 230, at 290 (quoting Stan MacDonald, *Two Women Tell the Court Why They Would Marry*, LOUISVILLE COURIER-JOURNAL, Nov. 12, 1970).

232. See Jack Star, *The Homosexual Couple*, LOOK, Jan. 26, 1971, at cover & 69. The pull-quote for the article proclaims “[a]s far as Jack Baker and Michael McConnell are concerned, their relationship ‘is just like being married.’” *Id.* at 69. The author carefully explains that the couple divides up traditionally feminine tasks according to their individual preferences and skills: “In many respects, the Baker-McConnell household is like that of any young marrieds except that there is no male-female role-playing. Neither is a limp-wristed sissy. ‘I do the dishes,’ says Baker, ‘because I don’t like to cook.’ ‘And I do the cooking,’ says McConnell, ‘because I cook better than Jack.’” *Id.* at 70. The article does however highlight one pertinent difference. It includes a picture of the two men shaving, captioned with the observation that their “daily life includes some odd bits of togetherness, like shaving.” *Id.*

233. See *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

234. For more comprehensive discussions of the role that same-sex marriage played in debates over the ERA, see, e.g., MATHEWS & DE HART, *supra* note 83, at 154 (describing how anti-ERA women were jarred by the “apocalyptic future that Schlafly sketched out” for homemakers, combined with the “abomination” that the “revolution in gender symbolized by an implicit sanction of homosexual marriage” (emphasis in original)); Franklin, *supra* note 91, at 139–41 (similar); Pascoe, *supra* note 90, at 92–102 (similar); Siegel, *supra* note 37, at 1390 (arguing Schlafly “linked together the ERA, abortion, and homosexuality in ways that changed the meaning of each, and mobilized a grassroots, ‘profamily constituency’ to oppose this unholy trinity”).

235. SCHLAFLY, *supra* note 7, at 89–90.

the deadbeat male—that is, to the homosexual who wants the same rights as husbands, [and] to the husband who wants to escape supporting his wife and children.”<sup>236</sup> These tactics proved effective. Although supporters of the ERA consistently argued that enactment of the amendment would not lead to gay marriage,<sup>237</sup> and in fact it was probably extremely unlikely that the Supreme Court of the 1970s would have interpreted the ERA to require granting same-sex couples access to marriage, such arguments played a key role in defeating the proposed amendment.<sup>238</sup>

In today’s debate, many opponents of same-sex marriage likewise frame their arguments in terms of protecting traditional gender roles. Michael Medved, a popular talk-radio host,<sup>239</sup> is especially explicit about the connection. Medved claims that social conservatives often “lose the debates before we even begin” by framing gay marriage as a decision regarding the validity or morality of homosexual attraction.<sup>240</sup> He suggests instead that the problem with same-sex marriage is that it “undermine[s] the crucial importance of gender specific roles in all relationships,” which he characterizes as a subject on which “nearly all Americans can agree.”<sup>241</sup> He continues:

A gay couple might claim that they fill distinctive roles in their relationship—with one woman working hard to support the family, for instance, while the other cooks and decorates and nourishes the kids. But choosing complementary roles for the sake of convenience or preference isn’t the same as recognizing that these contrasting approaches *arise from your very essence as a man or a woman*. There’s something arbitrary, synthetic and, indeed, temporary about

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236. *Id.* at 95.

237. See Pascoe, *supra* note 90, at 100–01. By 1977, when the National Conference on Women was held, supporters of the ERA adopted a platform proclaiming, “ERA *will NOT* change or weaken family structure. . . . ERA *will NOT* require States to permit homosexual marriage.” See NAT’L COMM’N ON THE OBSERVANCE OF INT’L WOMEN’S YEAR, THE SPIRIT OF HOUSTON: THE FIRST NATIONAL WOMEN’S CONFERENCE 51 (1978) (emphasis in original).

238. Baker and McConnell appealed the denial of a marriage license to them to the U.S. Supreme Court, which dismissed their case for “want of a substantial federal question.” *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *cert. denied*, 409 U.S. 810 (1972).

239. *Talkers Magazine* estimates that Medved reaches approximately 3.75 million listeners per week, making him one of the ten most listened-to talk show hosts in the country. See *The Top Talk Radio Audiences*, TALKERS MAG. (Sept. 6, 2011), <http://talkers.com/top-talk-radio-audiences>.

240. Michael Medved, *Gender Difference, Not Gay Marriage, at Center of Family Fight*, TOWNHALL (Aug. 2, 2006), [http://townhall.com/columnists/michaelmedved/2006/08/02/gender-difference\\_not\\_gay\\_marriage\\_at\\_center\\_of\\_family\\_fight/page/full/](http://townhall.com/columnists/michaelmedved/2006/08/02/gender-difference_not_gay_marriage_at_center_of_family_fight/page/full/).

241. *Id.*

a same sex couple attempting to imitate a heterosexual marriage by fulfilling distinct responsibilities in the relationship.<sup>242</sup>

Similar themes arise in a *Manifesto* in support of the “natural family” endorsed by several influential conservative leaders.<sup>243</sup> The *Manifesto* grounds opposition to marriage rights for same-sex couples in a broader denunciation of what it calls the “aggressive state promotion of androgyny.”<sup>244</sup> It decries a range of legal reforms and social changes in the latter half of the twentieth century, including “attacks on the meaning of ‘wife’ and ‘husband’” and the “imposition of full ‘gender equality’ [that] destroyed family-wage systems.”<sup>245</sup> It embraces an essentialist understanding of sex and a separate spheres ideology: young women are to grow into “wives, homemakers, and mothers” and young men are to grow into “husbands, homebuilders, and fathers.”<sup>246</sup> Thus, opposition to gay marriage is explicitly framed as part of a larger agenda to roll back modern sex discrimination principles and reinstate laws enforcing sex-stereotyped gender roles.

Media campaigns designed in connection with voter referenda on same-sex marriage laws have taken this strategy to heart. As Melissa Murray explores in detail, advertisements in the campaign in support of California’s Proposition 8, a proposal to amend California’s constitution to prohibit same-sex marriage, used explicit statements and subtextual gender cues to suggest that the opposition to same-sex marriage was not about (an arguably inappropriate) homophobia or animus to gay persons but rather

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242. *Id.* (emphasis added). Medved elsewhere characterizes the promotion of marriage rights for same-sex couples as “recycl[ing]” the . . . discredited ideas” of “‘Equity Feminists’ of the ’60s and ’70s” who had argued against gender roles. See Michael Medved, *Gay Marriage Recycles Bad Idea*, TOWNHALL (May 21, 2008), [http://townhall.com/columnists/michaelmedved/2008/05/21/gay\\_marriage\\_recycles\\_bad\\_idea/page/full/](http://townhall.com/columnists/michaelmedved/2008/05/21/gay_marriage_recycles_bad_idea/page/full/).

243. See Allan C. Carlson & Paul T. Mero, *The Natural Family: A Manifesto*, FAM. AM., Mar. 2005, at 1, available at <http://familymanifesto.net/fmDocs/FamilyManifesto.pdf>. Endorsers include Gary Bauer (former leader of the Family Research Council and currently president of American Values), the late Jerry Falwell (former leader of the Moral Majority), Phyllis Schlafly (founder of the Eagle Forum and, as discussed above, leader of the opposition to the ERA), Nebraska Congressman Lee Terry, Rick Warren (evangelical minister and bestselling author), and the late Paul Weyrich (co-founder of the Heritage Foundation and later leader of the Free Congress Foundation). See *Featured Endorsements*, THE NATURAL FAMILY: A MANIFESTO, <http://familymanifesto.net/fm/endorsements.asp> (last visited Feb. 18, 2012) (including an extensive list of endorsers). My thanks to Reva Siegel for bringing the *Manifesto* to my attention.

244. Carlson & Mero, *supra* note 243, at 21.

245. *Id.* at 11.

246. *Id.* at 14 (emphasis added). In a separate section, the *Manifesto* purports to recognize and “believe wholeheartedly in women’s rights,” but it defines these rights as “above all” rights that recognize “women’s unique gifts of pregnancy, birthing, and breastfeeding.” *Id.* at 25.

about a (perfectly appropriate) desire to protect gender roles.<sup>247</sup> For example, in one ad, Jan, who likes to cook, and Tom, who enjoys mowing the lawn, discuss how friendly they are with their gay neighbors but explain that because they “believe[] in and want[] to teach their children traditional family values,” they will be voting in favor of Proposition 8.<sup>248</sup> Another ad presents a young girl being raised by a male gay couple. Her two fathers are flustered when she asks them, “Where do babies come from?” Upon hearing that her friend Megan told her that babies come from a mommy and daddy who are married, they suggest that she should spend “less time over at Megan’s house,” thereby implicitly excluding their daughter from education on traditional gender roles that do not exist in her own family. The commercial concludes with a voiceover warning: “Let’s not confuse our kids. Protect marriage by protecting the real meaning of marriage: only between a man and a woman.”<sup>249</sup>

As I have explored in greater detail elsewhere, similar arguments are made in legal filings (particularly amicus briefs) in the same-sex marriage cases.<sup>250</sup> One such argument is that men and women, simply by virtue of their sex, provide different role models for children and that they play “opposite” and “complementary” roles within marriage.<sup>251</sup> The other argument prominent in recent cases—that marriage is essential to provide stability for different-sex couples who may accidentally procreate but not for same-sex couples who cannot—is likewise intertwined with gender norms.<sup>252</sup> The fuller explication of the argument focuses on the extent to

247. Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 366–90 (2009); see also Kathryn Abrams, *Elusive Coalitions: Reconsidering the Politics of Gender and Sexuality*, 57 UCLA L. REV. 1135, 1136–37 (2010) (similar).

248. See *Proposition 8—Made Simple*, YOUTUBE (Oct. 12, 2008), <http://www.youtube.com/watch?v=vI-GjWY-WIA>.

249. See *Proposition 8 Commercial*, YOUTUBE (Oct. 25, 2008), <http://www.youtube.com/watch?v=75J3TN9Zzck>.

250. See Widiss et al., *supra* note 11, at 487–504.

251. See *id.*; see also Franklin, *supra* note 91, at 163–70.

252. See, e.g., *Andersen v. King Cnty.*, 138 P.3d 963, 1002 (Wash. 2006) (Johnson, J., concurring in judgment) (“Unlike same-sex couples, only opposite-sex couples may experience unintentional or unplanned procreation. State sanctioned marriage as a union of one man and one woman encourages couples to enter into a stable relationship prior to having children and to remain committed to one another in the relationship for the raising of children, planned or otherwise.”); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (plurality op.) (“[Same-sex couples] do not become parents as a result of accident or impulse. The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more.”). See also Edward Stein, *The ‘Accidental Procreation’ Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403 (2009) (discussing emergence of this argument and its connection to earlier more general arguments that marriage is



which marriage is necessary to protect “vulnerable” women from “irresponsible” men who otherwise would abandon them.<sup>253</sup> Often these claims are couched specifically in terms of the distinct responsibilities of “husbands” and “wives.” For example, Monte Stewart, a director of the Marriage Law Foundation who has authored numerous briefs in same-sex marriage litigation as well as several academic articles, opposes what he calls the move to “genderless marriage”<sup>254</sup> on the ground that “man/woman marriage is the only institution that can confer the status of *husband* and *wife*, that can transform a male into a husband or a female into a wife (a social identity quite different from ‘partner’).”<sup>255</sup> Lynn Wardle, another academic who has written extensively opposing expansion of marriage rights, likewise opines that “[l]egalizing same-sex marriage will instantly transform the meaning of *marriage*, *spouse*, *husband*, [and] *wife*.”<sup>256</sup>

These arguments have remained strikingly consistent even though the legal reality of the claims has changed dramatically. When made in the 1970s, such arguments reflected the fact that the legal responsibilities of husbands and wives were, as discussed above, significantly different. Modern claims that recognition of same-sex marriage “threatens” the institution of marriage by undermining the meaning of “wife” and “husband” should be far less effective because contemporary sex discrimination jurisprudence demands that the roles of “wife” and “husband” are no longer legally distinct. However, as detailed in Part II.C, these terms continue to carry a cultural resonance that is significant, and

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related to procreation before ultimately concluding the accidental procreation argument is inadequate to justify denying marriage rights to same-sex couples).

253. See Widiss et al., *supra* note 11, at 494–98.

254. Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL’Y 1 (2006). Stewart explains that he chooses this term (“genderless marriage”), rather than the more common terms such as same-sex marriage or gay marriage, to emphasize that expansion of marriage rights results in a single state-marriage-available to both same-sex and different-sex couples, rather than a new, different institution of “same-sex marriage.” *Id.* at 4 n.6. I agree with his point that it is helpful to emphasize that marriage is a single institution, although I believe the shift towards a less gendered understanding of marriage is a positive rather than negative development.

255. *Id.* at 19 (emphasis in original). Stewart uses virtually identical language in his briefs. See, e.g., Brief for United Families Int’l as Amici Curiae Supporting Defendant-Appellant, at 17–18, *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (No. 98084), available at <http://marriagelawfoundation.org/publications/NY%20COA%20Brief.pdf>. He does admit, summarizing an argument put forward by Nicholas Bala, that the legal significance of these terms has changed dramatically since the 1970s, Stewart, *supra* note 254, at 61–63, and further that “socially there is a growing ambiguity about the roles of ‘husband’ and ‘wife.’” *Id.* at 63 (citation omitted).

256. Lynn D. Wardle, *The Attack on Marriage As the Union of a Man and a Woman*, 83 N.D. L. REV. 1365, 1377 (2008) (emphasis in original).

thus the criticism has a certain logic (whether or not one agrees that it is potentially harmful) when one considers the social significance the terms still hold. Like rhetoric used to oppose the ERA, these claims reflect a conviction—which may well be correct—that one of the best ways to fight against changes in formal sex-based classifications (that is, recognition of same-sex marriage) is to tap into still widely shared beliefs that men and women should play distinct and different roles within marriage.

Those on the other side of the debate—that is, proponents of expanding marriage rights—likewise have considered the connections between sex-based classifications and gender roles within the marriage equation. During the 1980s and 1990s, leaders of the lesbian and gay advocacy and scholarly community debated whether it was worth working to broaden marriage eligibility. At that time, some of the staunchest proponents of same-sex marriage rights supported their case in part on the grounds that it would challenge gender norms in marriage more generally. Thomas Stoddard, then executive director of Lambda Legal Defense and Education Fund, argued that “enlarging the concept” of marriage would “necessarily transform it into something new. If two women can marry, or two men, marriage—even for heterosexuals—need not be a union of a ‘husband’ and a ‘wife.’”<sup>257</sup> Paula Ettelbrick, then legal director of the organization, disagreed, arguing that seeking marriage rights—and thus necessarily contending that gay couples were “just like” heterosexual couples—would “begin the dangerous process of silencing our different voices.”<sup>258</sup>

A few years later, a conversation between law professors Nan Hunter and Nancy Polikoff revisited these same questions.<sup>259</sup> Hunter, like Stoddard, argued that legalizing marriage for same-sex couples “would have enormous potential to destabilize the gendered definition of marriage for everyone.”<sup>260</sup> Same-sex marriage, she contended, “could create the model in law for an egalitarian kind of interpersonal relation”<sup>261</sup> by “rais[ing] the question of what, without gendered content, could the social categories of ‘husband’ and ‘wife’ mean.”<sup>262</sup> Polikoff, on the other hand, contended that rather than transforming the institution of marriage, the advent of same-sex marriage would threaten to transform the relationships of gays and lesbians. She reviewed evidence gathered by William

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257. Stoddard, *supra* note 13, at 19. He also emphasized practical benefits that would flow from marriage. *See id.*

258. Ettelbrick, *supra* note 14, at 22.

259. Hunter, *supra* note 13; Polikoff, *supra* note 14.

260. Hunter, *supra* note 13, at 12.

261. *Id.* at 17.

262. *Id.* at 16.

Eskridge (as counsel in one of the early second-wave gay marriage cases) on same-sex marriage in other cultures that showed that despite being of the same sex, the spouses took on distinctly gendered—and distinctly hierarchal—roles.<sup>263</sup> She predicted that in seeking marriage rights, gays and lesbians would minimize the transformative aspect of their claim and valorize the current institution of marriage.<sup>264</sup>

When challenges to different-sex marriage laws began to succeed, the gay and lesbian advocacy movement presented a largely unified front in support of expanding marriage rights.<sup>265</sup> At the time of this writing, the major national gay and lesbian advocacy organizations have actively supported litigation and legislative efforts to expand marriage rights. (As noted above, in recent years, some academic commentators and individual advocates for lesbian and gay rights have begun once again to question publicly the focus on marriage.<sup>266</sup>) But contemporary proponents of expanding marriage rights no longer claim that it will transform gender roles within *different-sex* marriages. Rather, in response to oft-stated claims that the advent of same-sex marriage would “destroy” the “institution” of marriage, advocates have carefully minimized the impact of the change they seek. Their consistent argument, particularly in public education efforts, lobbying, and the popular press, has been that permitting same-sex marriage would in no way affect different-sex marriages.<sup>267</sup> Thus, as Courtney Cahill observes, advocates for expansion of marriage rights have de-emphasized research showing that same-sex couples *do* tend to differ from different-sex couples, even in ways—like the egalitarian division of household responsibilities—that many might find normatively attractive.<sup>268</sup>

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263. Polikoff, *supra* note 14, at 1538–40.

264. *Id.* at 1540–41.

265. *See, e.g.*, Schacter, *supra* note 17, at 394 (discussing how advocates within the LGBT movement who were once openly skeptical of the value of working to expand marriage rights began fighting for marriage once it was framed as the definitive issue of gay and lesbian equality).

266. *See supra* text accompanying notes 24–30.

267. *See, e.g.*, FREEDOM TO MARRY, MOVING MARRIAGE FORWARD: BUILDING MAJORITY SUPPORT FOR MARRIAGE 5, available at <http://www.letcaliforniarising.org/att/cf/%7B7a706b3a-165f-4950-9144-2fc92fe4d8d1%7D/MOVING%20MARRIAGE%20FORWARD%20REPORT.PDF> (“When talking about the freedom to marry, share the truth: gay couples want to join marriage, not ‘change’ it, as opponents like to threaten. . . . [W]e should talk about . . . the same rules, same responsibilities, and same respect for all committed couples.”); *Talking Points*, MARRIAGE EQUALITY RHODE ISLAND, [http://www.marriageequalityri.org/www/learn/talking\\_points](http://www.marriageequalityri.org/www/learn/talking_points) (last visited Feb. 18, 2012) (“The way the law defines marriage is to give committed couples the tools they need to care for each other—opening civil marriage to same-sex couples won’t change that.” (emphasis added)).

268. *See* Courtney Megan Cahill, *Celebrating the Differences That Could Make a Difference: United States v. Virginia and a New Vision of Sexual Equality*, 70 OHIO ST. L.J. 943, 969–79 (2009).

In a nutshell, the Stoddard/Hunter pro-marriage arguments can be characterized as a belief that when “sex” is functionally removed from the marriage equation, same-sex couples’ egalitarian gender norms will trump both the specialization bias of substantive marriage law and cultural understandings of what marriage “means.” And furthermore, by demonstrating the possibility of a more egalitarian marriage, same-sex marriage can change different-sex marriage. The Ettelbrick/Polikoff critique worries by contrast that the specialization bias of substantive marriage law and societal understandings of marriage grounded in its patriarchal past will trump the relatively egalitarian gender norms of same-sex couples. Finally, many prominent modern proponents of expanded marriage rights simply contend that same-sex marriage is not part of the (different-sex) marriage equation at all.

## 2. *Sex Discrimination Claims in Court*

Given the prevalence of sex-based stereotypes in justifications for denying same-sex marriage, one might have expected claims that same-sex marriage bans constitute sex discrimination to be successful. This has not been the case. As of March 2012, several state courts of last resort have held denial of marriage rights to same-sex couples unconstitutional,<sup>269</sup> but none of these decisions relies on sex discrimination rationales.<sup>270</sup> Rather, courts (both those that rule for plaintiffs on other grounds and those that deny plaintiffs’ claims entirely) typically conclude that, despite the use of sex-based classifications, heightened scrutiny is not merited because men and women are disadvantaged equally: Neither (gay) men nor (lesbian) women can marry the spouse of their choice.<sup>271</sup> The putative legal equality

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269. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). Additionally, California held a state statute that limited marriage to different-sex couples unconstitutional. See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), but later held that a constitutional amendment banning same-sex marriage was constitutionally permissible. See *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

270. For detailed discussion of courts’ treatment of sex discrimination claims, see Widiss et al., *supra* note 11, at 468–72. The Hawaii Supreme Court held that the sex-based classifications in the marriage statute required strict scrutiny and remanded the case to the district court to determine whether the state could provide a sufficiently compelling justification. See *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993). The case was subsequently mooted when Hawaii enacted a constitutional amendment limiting marriage in the state to the union of a man and a woman. See HAW. CONST. art. 1, § 23.

271. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 10 (N.Y. 2006) (“[T]he restriction of marriage to opposite-sex couples is subject only to rational basis scrutiny . . . [because it] does not put men and women in different classes, and give one class a benefit not given to the other.”); *Andersen v. King Cnty.*, 138 P.3d 963, 988 (Wash. 2006) (holding that because “[m]en and women are treated

of husbands and wives is used as grounds to reject sex-stereotyping claims. Courts reason that the separate spheres ideology is no longer enforced in law and the prior reform of marriage law is not relevant to the current debate.<sup>272</sup>

Elsewhere, I have argued that these conclusions are unfounded. Arguments against same-sex marriage are permeated with assumptions about appropriate gender roles. These justifications should be recognized as inadequate under anti-stereotyping doctrine.<sup>273</sup> But the fact that courts embrace these justifications—e.g., that it is a “commonsense premise that children will do best with a mother and a father in the home”<sup>274</sup>—helps highlight just how natural such gendered assumptions still seem. Courts also reaffirm the significance of sex-based classifications in their substantive Due Process analysis. In that context, courts consistently hold that “marriage” is “fundamental” because it is “deeply rooted in the Nation’s history and tradition,” but that a separate status they call “same-sex marriage” is not.<sup>275</sup> In other words, they reify the man/woman aspect of marriage as inherent to the meaning of marriage.

The district court decision in *Perry v. Schwarzenegger* (now *Perry v. Brown*),<sup>276</sup> the federal court challenge to California’s Proposition 8, is an important exception to the approach described above. The district court reviewed copious historical evidence.<sup>277</sup> It concluded that the core of the right to “marriage” has been and remains the right to “choose a spouse and, with mutual consent, join together and form a household,” and changes in the racial and sex-based requirements associated with marriage

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identically under [the state’s] DOMA” it does not discriminate on the basis of sex). As Mary Anne Case argues persuasively, this matter-of-fact acceptance of such “equal” classifications is out of line with sex discrimination decisions in other contexts. See Case, *supra* note 17, at 1219–21.

272. See, e.g., *Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999) (“It is one thing to show that long-repealed marriage statutes subordinated women to men within the marital relation. It is quite another to demonstrate that the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles or anxiety about gender-role confusion.”); *Andersen*, 138 P.3d at 989 (“[T]here is nothing in [the state’s] DOMA that speaks to gender stereotyping within marriage.”).

273. See Widiss et al., *supra* note 11, at 487–504.

274. *Hernandez*, 855 N.E.2d at 8; see also, e.g., *Andersen*, 138 P.3d at 983 (similar); *id.* at 1005–06 (Johnson, J., concurring in judgment) (“[B]ecause of the nonfungible differences between men and women, . . . [same-sex marriage’s] differences from the optimum mother/father setting for stable family life may offer distinctive disadvantages.”).

275. *Hernandez*, 855 N.E.2d at 9; see also, e.g., *Lewis v. Harris*, 908 A.2d 196, 207, 209 (N.J. 2006) (same); *Andersen*, 138 P.3d at 976, 978 (same). For a more detailed discussion of this analysis, see Tebbe & Widiss, *supra* note 23, at 1391–93.

276. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *affirmed sub nom. Perry v. Brown*.

277. See *id.*

have not changed this core meaning.<sup>278</sup> The court therefore held that the exclusion of same-sex couples from marriage was “an artifact of a time when the genders were seen as having distinct roles in society and in marriage.”<sup>279</sup> Accordingly, the court rejected proponents’ claim that the plaintiffs in the case sought a “new right” to same-sex marriage, explaining rather that they sought the same thing “opposite-sex couples across the state enjoy—namely, marriage.”<sup>280</sup> I believe this approach appropriately recognizes the interrelationship of Due Process analysis with sex-discrimination analysis, but the *Perry* court stands virtually alone in its approach. Notably, although the Ninth Circuit affirmed the district court’s judgment that Proposition 8 was unconstitutional, it did so on the relatively narrow ground that there was no legitimate justification for stripping from same-sex couples the right to marry that the state had previously permitted; the Ninth Circuit did not reach the broader question of whether simply denying marriage rights to same-sex couples violates the Constitution, and accordingly it did not address the lower court’s Due Process or sex discrimination analysis.<sup>281</sup> At the time of this writing, it remains to be seen whether the U.S. Supreme Court will consider the issue.

### *B. Disaggregating Gender*

Contemporary advocates of expanded marriage rights are reluctant to suggest that recognition of same-sex marriages will change different-sex marriages.<sup>282</sup> This may well be a smart strategy from litigation, public relations, and fundraising perspectives—and it certainly is an understandable response to the apocalyptic claims of those opposing expansion of marriage rights. But now that same-sex marriage exists, these previously academic debates have on-the-ground significance. They are no longer abstract musing about gender roles. Rather, they are the day-to-day decisions made by (newly married) same-sex couples around the country. Will one husband drop out of the paid workforce to stay home with children while the other husband provides income? Will one wife focus on advancing her career while the other wife provides domestic support?

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278. *Id.* at 993.

279. *See id.*

280. *See id.*

281. *See Perry v. Brown*, No. 10-16696, 11-16577, 2012 U.S. App. LEXIS 2328, at \*16-\*18 (9th Cir. Feb. 7, 2012).

282. *See supra* notes 267–68 and accompanying text.

Simply asking the questions highlights the potentially transformative impact of the reality.

This transformation could occur in two ways. The first—and the one that is typically assumed by opponents of same-sex marriage—is that the mere fact of state recognition of same-sex marriage will weaken the gendered understanding of spousal roles within different-sex marriages. This likewise was the position advanced by earlier proponents of same-sex marriage such as Thomas Stoddard and Nan Hunter.<sup>283</sup> A few researchers have tried to assess whether such effects exist by studying European countries where legal recognition of same-sex relationships (often not called marriages) predates recognition of such relationships in the United States. Some have claimed to find significant effects; others find little or no effect.<sup>284</sup>

The second way that the new reality of same-sex marriage could change marriage is by permitting enhanced understanding of the *relative importance* of gender norms compared to substantive marriage law in how couples make decisions, particularly decisions related to the allocation of income-producing and caregiving responsibilities. Whether or not the simple existence of same-sex married couples will transform gender roles, the new reality of same-sex marriage offers a natural experiment that can—and I think should—inform policy debates regarding marriage more generally. In other words, it offers the possibility of pulling apart the marriage equation.

This premise begins by recognizing that in different-sex couples, it is often difficult to disaggregate the relative significance of efficiency gains from specialization, economic exchange dynamics, and gender pressures, since they all tend to mutually reinforce a traditional gendered divide within a family. Same-sex relationships therefore offer the opportunity to help identify the distinct roles that sex, gender, and societal expectations play in the division of responsibilities within families. In 1983, Philip Blumstein and Pepper Schwartz published a book with the results of the first large-scale study of married (heterosexual) couples, unmarried

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283. See *supra* notes 257, 260 and accompanying text.

284. Compare Stanley Kurtz, *The End of Marriage in Scandinavia: The “Conservative Case” for Same-Sex Marriage Collapses*, 9 WEEKLY STANDARD, Feb. 2, 2004, at 26 (claiming recognition of same-sex marriage contributed to declining marriage rates for heterosexual couples), and M. Van Mourick et al., *Good for Gays, Bad for Marriage*, NATIONAL POST, Aug. 11, 2004, at A16 (similar), with WILLIAM ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE’VE LEARNED FROM THE EVIDENCE* (2006) (finding small positive effects on culture of marriage following recognition of same-sex relationships), and BADGETT, *supra* note 8, at 64–85 (finding little to no effects on marriage behavior or beliefs of heterosexuals).

heterosexual couples, and same-sex couples in long-term relationships.<sup>285</sup> They found that most heterosexual married couples still divided responsibilities along distinctly gendered lines; same-sex couples, by contrast, divided housework and decision-making more equally. The authors noted, however, that same-sex couples accordingly lost some of the “efficienc[ies]” associated with traditional gender roles.<sup>286</sup>

Numerous studies conducted more recently have likewise found that lesbian and gay couples divide housework much more equally than different-sex couples.<sup>287</sup> As one researcher put it, “[A]lthough members of gay and lesbian couples do not divide household labor in a perfectly equal manner, they are more likely than members of heterosexual couples to negotiate a balance between achieving a fair distribution of household labor and accommodating the different interests, skills, and work schedules of particular partners.”<sup>288</sup> One of the most detailed examinations is a study that compared same-sex couples who registered for civil unions during the first year that they were legalized in Vermont with their married heterosexual siblings.<sup>289</sup> The researchers determined that, as they expected, the lesbian and gay couples divided responsibility for housework considerably more equally than heterosexual couples; in fact, referring to the various economic and gender-related theories put forth to explain different-sex couples’ division of responsibilities, the researchers observed that sexual orientation was a stronger predictor of equality of division than income. That is, same-sex couples with significantly different incomes not only divided house work more equally than different-sex couples with significantly different incomes, but also more equally than different-sex couples with similar incomes.<sup>290</sup>

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285. See PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* (1983).

286. *Id.* at 324–25.

287. See, e.g., Letitia Anne Peplau & Leah R. Spalding, *The Close Relationships of Lesbians, Gay Men, and Bisexuals*, in *CLOSE RELATIONSHIPS: A SOURCEBOOK* 111 (2000) (collecting studies); Letitia Anne Peplau & Adam W. Fingerhut, *The Close Relationships of Lesbians and Gay Men*, 58 ANN. REV. PSYCHOL. 405 (2007) (same); Mally Shechory & Riva Ziv, *Relationships between Gender Role Attitudes, Role Division, and Perception of Equity Among Heterosexual, Gay and Lesbian Couples*, 56 SEX ROLES 629, 630 (2007) (same).

288. Lawrence A. Kurdek, *What Do We Know About Gay and Lesbian Couples?*, 14 CURRENT DIRECTIONS PSYCHOL. SCI. 251, 252 (2005); see also Lawrence A. Kurdek, *The Allocation of Household Labor by Partners in Gay and Lesbian Couples*, 28 J. FAM. ISSUES 132 (2007) (similar).

289. See Solomon et al., *supra* note 19, at 572.

290. See *id.* Notably, since the heterosexual couples included a sibling of the gay or lesbian couple, the background and upbringing was similar for at least half of each couple, “rais[ing] questions about how women and men are socialized to assume gendered roles in adult relationships.” *Id.* at 573.



Many studies of lesbian parents also find that they share childcare responsibilities considerably more equally than different-sex parents.<sup>291</sup> For example, one study that looked specifically at lesbian couples transitioning into parenthood recorded consistent efforts by the couples to develop special “mothering” opportunities for the non-biological mom, such as taking on bath-time routines.<sup>292</sup> In sharp contrast to different-sex couples, where the birth of a child often signals not only a decrease in the mother’s paid work hours but an increase in the father’s, several of the couples reported that both the biological and the non-biological mother decreased paid work hours to better accommodate childcare responsibilities.<sup>293</sup> Another study, which compared lesbian couples raising children to heterosexual couples, likewise found that lesbian mothers in a couple each tended to spend about the same number of hours each week in paid employment and to split childcare responsibilities relatively equally, while in heterosexual families, fathers spent twice as much time in paid employment as their wives and considerably less time providing direct childcare.<sup>294</sup> Although there are far fewer studies of gay male parents, several also find relatively co-equal parenting.<sup>295</sup>

Of course, these findings do not mean gender does not matter in same-sex couples. Rather, they simply suggest that when both members of the couple are the same sex and thus receive similar gendered “conditioning,” they may more readily share responsibilities both within and outside the home more equally. Same-sex couples typically state that their normative ideal is equal sharing of home and work responsibilities, although this may also depend in part on dimensions of race and class.<sup>296</sup>

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291. See, e.g., Timothy J. Biblarz & Evren Savci, *Lesbian, Gay, Bisexual, and Transgender Families*, 72 J. MARRIAGE & FAM. 480 (2010) (collecting studies); Charlotte J. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 J. MARRIAGE & FAM. 1052, 1054 (2000) (same); Peplau & Fingerhut, *supra* note 287, at 415 (same).

292. See Abbie E. Goldberg & Maureen Perry-Jenkins, *The Division of Labor and Perceptions of Parental Roles: Lesbian Couples Across the Transition to Parenthood*, 24 J. SOC. & PERS. RELATIONSHIPS 297, 308–09 (2007).

293. *Id.* at 314.

294. Charlotte J. Patterson et al., *Division of Labor Among Lesbian and Heterosexual Parenting Couples: Correlates of Specialized Versus Shared Patterns*, 11 J. ADULT DEV. 179, 187 (2004). The researchers also found that despite similar educational background, heterosexual mothers had less prestigious paid work than heterosexual fathers or than lesbian mothers. *Id.*

295. See, e.g., SUZANNE M. JOHNSON & ELIZABETH O’CONNOR, *THE GAY BABY BOOM* 156–58 & tbl.9.5 (2002) (finding gay male couples reported dividing childcare responsibilities relatively equally); Biblarz & Savci, *supra* note 291, at 487 (collecting studies showing relatively equal sharing).

296. See, e.g., Patterson et al., *supra* note 294, at 183; but cf. Mignon R. Moore, *Gendered Power Relationships among Women: A Study of Household Decision Making in Black, Lesbian Stepfamilies*, 73 AM. SOC. REV. 335, 343, 348 (2008) (suggesting this may differ for black lesbians).

There have been a handful of studies that suggest greater levels of specialization within gay and lesbian couples than the studies discussed above. A review of California census data found that about the same percentage of same-sex and different-sex couples raising children had only one wage earner.<sup>297</sup> Some studies have found that in lesbian couples where one mother is biologically related to the child, it is relatively common for her to take on greater childcare responsibilities, even after biological differences—such as ability to breastfeed—are no longer salient.<sup>298</sup> A recent study of black lesbians in “step-parent” relationships (that is, where children were born in a prior heterosexual relationship) concluded that these couples were less likely than their white lesbian counterparts to pool financial resources or to divide childcare or domestic responsibilities equally.<sup>299</sup> Specialization may occur even without these child-related distinctions. An older qualitative study of fifty-two long-term gay and lesbian couples, very few of whom had children, found quite high levels of specialization.<sup>300</sup>

Such findings of specialization within gay and lesbian couples merit further exploration. Key factors to consider may be the extent to which race, class, duration of relationships, age or age differential between members of the couple, genetic or gestational relationships (or lack thereof) to children, or “step-parent” relationships may affect couples’ decision-making regarding the allocation of domestic responsibilities. Methodological distinctions may also be important. For example, one researcher suggests his findings of relatively high levels of specialization

297. See Gary J. Gates, CENSUS SNAPSHOT: CALIFORNIA LESBIAN, GAY, AND BISEXUAL POPULATION 4 (2008), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Ramos-CA-Snapshot-Oct-2008.pdf> (finding 39% of same-sex couples raising children included only one wage earner, compared with 42% of different-sex couples). These rates are both very high compared to national averages. See U.S. CENSUS BUREAU, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: 2007 14 (2009), available at <http://www.census.gov/population/www/socdemo/hh-fam/p20-561.pdf> (24% of married-couple family groups included a stay-at-home mother). The national study does not calculate the percentage of married family groups that included a stay-at-home father, but estimates that there are 165,000 families with a stay-at-home father, a tiny fraction of the approximately 5.6 million families with a stay-at-home mother. See *id.* at n.19. In part, the difference between the California figures and the national figures may reflect different terminology, since the U.S. census study also finds that 34% of married couples with children had only one wage earner.

298. See Jordan B. Downing & Abbie E. Goldberg, *Lesbian Mothers’ Constructions of the Division of Paid and Unpaid Labor*, 21 FEMINISM & PSYCHOL. 100 (2011); see also Biblarz & Staci, *supra* note 291, at 483 (collecting studies).

299. See Moore, *supra* note 296.

300. CHRISTOPHER CARRINGTON, NO PLACE LIKE HOME: RELATIONSHIPS AND FAMILY LIFE AMONG LESBIANS AND GAY MEN 184–206 (1999). Carrington classified thirteen of the families as achieving a rough “parity” in their domestic obligations and thirty-eight in which one member of the couple specialized in domestic work. *Id.* at 184, 187.

may stem in part from shadowing his subjects and conducting back-to-back interviews, rather than relying on self-reports or joint interviews, which can be subject to purposeful or inadvertent distortions.<sup>301</sup> He proposed that the phenomenon of correcting for “gender deviance,” documented in different-sex couples,<sup>302</sup> may play in reverse for same-sex couples, with such couples “correcting” for gender deviance by claiming the split is more equal than it actually is.<sup>303</sup> And, as further discussed below, the existence of legal marriage, other legal statuses (such as civil unions), or non-legal commitment ceremonies may affect the likelihood of specialization as well.

Despite such variation, it is fair to conclude that the majority of current studies find that same-sex couples share responsibilities for childrearing and for housework more equally than different-sex couples, and that they also tend to work more equal hours outside the home. Thus, naturally, researchers have suggested that gay and lesbian couples may be a model for different-sex couples. The Vermont researchers, for example, suggest that “[s]ame-sex couples are a model for ways of equalizing the division of housework.”<sup>304</sup> These echo the claims made a generation ago by Thomas Stoddard and Nan Hunter that recognition of marriage rights for same-sex couples could help upend the separate spheres mentality for different-sex couples.<sup>305</sup> Although, as noted above, current advocates for marriage rights tend to eschew such arguments, a few commentators in the popular press have picked up on this theme.<sup>306</sup> There is potential here—but it may be illusory. These claims overlook a key factor that is generally ignored: the data sets used in these studies uniformly predate legal marriage for same-sex couples.

### *C. Disaggregating Marriage*

The empirical and qualitative studies described in the previous sub-part typically compare heterosexual married couples to same-sex couples in long-term relationships. These differ in two significant ways. The first, and the one that has been the focus of the studies, is obviously whether the members of the couple are of the same or different sexes. The second distinction is whether the couple is married or not. Although the latter

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301. *Id.* at 176.

302. *See* MAHONEY, *supra* note 192.

303. *See* CARRINGTON, *supra* note 300, at 52–53, 216–18.

304. Solomon et al., *supra* note 19, at 572.

305. *See supra* notes 257, 260–62 and accompanying text.

306. *See, e.g.,* Parker-Pope, *supra* note 19; Belkin, *supra* note 19.

distinction is rarely considered significant in the study design, and in fact is often completely ignored, it may be an important factor.<sup>307</sup> None of the data sets used in the studies described in the previous part include married same-sex couples.<sup>308</sup> That is likely soon to change. A rapidly growing number of states permit same-sex couples to marry or have created a status, such as civil union or domestic partnership, that provides all of the state-level benefits of marriage. As of March 2012, Connecticut, Iowa, Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington, as well as the District of Columbia, have legalized same-sex marriage, and California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, and Rhode Island have state laws providing the equivalent of spousal rights to same-sex couples within the state.<sup>309</sup> Even before New York legalized same-sex marriage in the summer of 2011, researchers estimated that approximately 50,000 same-sex couples in this country had married, and that another 85,000 same-sex couples had entered civil unions or domestic partnerships.<sup>310</sup> New York's enactment of marriage legislation doubled the percentage of same-sex couples living in states that permit them to marry.<sup>311</sup>

The new reality thus offers significant potential for disaggregating the elements of the marriage equation to better understand the relative significance of each factor in how couples make decisions. The studies discussed in Part III.B, showing that same-sex couples are more likely than different-sex couples to participate equally in the workforce and to

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307. A few studies mention the absence of legal marriage as a potential factor that merits future study. *See, e.g.*, Patterson et al., *supra* note 198, at 188. Lee Badgett offers a fuller discussion of the possible implication of the absence of the legal benefits of marriage on the specialization—or lack thereof—of lesbian couples. *See* M. V. LEE BADGETT, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN 160–63 (2001).

308. The Solomon et al., *supra* note 19, study of members of civil unions in Vermont is a partial exception, since civil unions provide the rights and benefits of marriage, albeit without the actual moniker of “marriage.” However, Vermont does not have a residency requirement for eligibility for civil unions and, since Vermont was the first state to recognize a legal status comparable to marriage, many out-of-state couples registered for civil unions. *Id.* at 561–62. Accordingly, only one-fifth of the couples in the study were from Vermont. *Id.* at 564. At the point where the study was conducted, no other state recognized civil unions as granting the benefits of marriage under state law. Thus, the vast majority of study participants had minimal or no legal benefits from their civil union status.

309. *See* sources cited *supra* note 16. Additionally, Colorado, Maine, and Wisconsin provide at least some of the benefits of marriage to same-sex couples that register as domestic partners. *See* HUMAN RIGHTS CAMPAIGN, *supra* note 16.

310. *See* Press Release, Williams Inst., *supra* note 15.

311. Press Release, Williams Inst., Extending Marriage to Same-Sex Couples in New York Will Impact Over 42,000 Couples Raising 14,000 Children in the State (June 15, 2011), *available at* <http://williamsinstitute.law.ucla.edu/press/press-releases/extending-marriage-to-same-sex-couples-in-new-york-press-release-jun-2011>.

divide household responsibilities equally, may simply reflect the necessity that as an unmarried couple, each individual will do more to “look out” for his or her own interests. The absence of a legal union could also make it prohibitively expensive or impossible to achieve certain benefits that can flow from specialization in different-sex married couples.<sup>312</sup> If this is the case, the more rights of marriage that same-sex couples can access, the more likely one would begin to see a division of responsibilities—including one member of a family dropping out of, or minimizing participation in, the paid workforce—that mirror those of heterosexual married couples. At the margins, at least, the combination of substantive marriage laws and tax and benefits policies will push a couple towards specialization.<sup>313</sup>

Future studies that use data from same-sex couples who are married thus can greatly increase our understanding of the relative importance of such legal rights. Significantly, it is not possible to fully compare same-sex married couples to different-sex married couples because the federal Defense of Marriage Act (DOMA) denies same-sex couples the many federal benefits of marriage.<sup>314</sup> The U.S. General Accounting Office has determined that there are 1,138 federal statutes that reference marriage; DOMA provides that same-sex couples are not recognized as “married” in any of these contexts.<sup>315</sup> This means, among other things, that same-sex couples cannot file their federal taxes as a married couple, are not eligible for social security spousal benefits, and cannot sponsor a spouse for immigration status. (For any given couple, the inapplicability of federal law may not be an unmitigated disadvantage. For example, as discussed above, under federal law, some married couples face a “marriage penalty” relative to the amount that they would pay as single persons;<sup>316</sup> thus, for

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312. The specific tax, pension, social security, and welfare benefits discussed above are simply unavailable to same-sex couples who cannot marry. Some of the other benefits of marriage, particularly upon divorce or death, may be achieved through private contract. This is expensive and time-consuming. Further, to the extent that a couple disagrees (for example, a breadwinning spouse might be unwilling to pre-commit to income-sharing upon divorce), the shift from the legal default applied in marriage—income earned during a marriage is shared—to the legal default applied to cohabitators—income earned during a marriage is separate—can be quite significant. *See supra* text accompanying notes 140–41.

313. Importantly, this may be true whether or not couples identify accessing legal rights as a key reason for their choice to marry. *Cf.* Kimberly D. Richman, *By Any Other Name: The Social and Legal Stakes of Same-Sex Marriage*, 45 U.S.F. L. REV. 357, 367–69, 372–77 (2010) (reporting that in interviews, same-sex couples typically identified legal rights as comparatively less important than love and public validation in reasons they chose to marry).

314. *See* 1 U.S.C. § 7 (2006).

315. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 47.

316. *See supra* notes 124–26 and accompanying text.

same-sex married couples with relatively equal incomes, the inability to file joint federal taxes may actually reduce the aggregate amount of taxes they owe, as well as permit them to engage in a range of other tax-avoidance strategies.<sup>317</sup>) DOMA also permits states to refuse to recognize out-of-state marriages between persons of the same sex, meaning that if same-sex couples move from a jurisdiction that permits marriage to one that does not, they will no longer have the state benefits of marriage either.<sup>318</sup>

In July 2010, a federal district court held that the portions of DOMA that preclude federal recognition of same-sex marriages are unconstitutional.<sup>319</sup> President Obama has since declared that his administration would no longer defend the constitutionality of those provisions in pending challenges,<sup>320</sup> although U.S. House of Representatives' Bipartisan Legal Advisory Group has stepped in to make the defense.<sup>321</sup> The ultimate resolution of these cases is uncertain. The demise of DOMA would obviously be a significant benefit for same-sex married couples, and one that I believe is warranted under existing constitutional principles and as a matter of good policy. That said, the current moment, when the federal benefits of marriage are not available, offers the opportunity, which may be fleeting, to compare the relative significance of aspects of federal law that push couples towards specialization and aspects of state law that do. If decisions striking down the provisions of DOMA that limit access to federal benefits are upheld, or if DOMA were repealed, there would be greater opportunity for a true comparison between different-sex and same-sex married couples, but researchers would lose the possibility to probe the relative significance of the state versus federal factors. Accordingly, studies completed in the

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317. See generally Theodore Soto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529 (2008) (demonstrating how gay couples could arrange their affairs to pay federal income taxes at significantly lower rates than different-sex couples with the same economic circumstances).

318. See 28 U.S.C. § 1738C (2006).

319. See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010), *appeal pending*; *Massachusetts v. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010), *appeal pending*. A handful of other lower courts have likewise held that this section of DOMA is unconstitutional. See, e.g., *Golinski v. United States Office of Personal Mgmt.*, No. C-10-00257 (N.D. Cal. Feb. 22, 2012), *appeal pending*; *In re Balas*, 449 B.R. 567, 576 (Bankr. C.D. Cal. 2011). There are several other pending cases.

320. See Press Release, Dep't of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.

321. Letter from John A. Boehner, Speaker of the House, to Nancy Pelosi, Democratic Leader of the House (Apr. 18, 2011), available at <http://www.speaker.gov/UploadedFiles/DOMALetter.pdf>.

current legal regime may be a helpful counterpoint to future studies if DOMA is repealed or struck down as unconstitutional.

The current variability in legal recognition among states should also encourage the development of studies that probe in a more fine-grained manner how the discrete elements of “marriage” may impact couples’ decision-making. That is, this Article has focused primarily on the substantive legal rights and benefits afforded by marriage law. Marriage also carries significant social meaning, what might be characterized as the “expressive value” of marriage. And marriage is a statement by a couple to each other that they are committed to a long-term, ideally life-long, relationship. When different-sex couples marry, they simultaneously enjoy all of these aspects of marriage, and all three likely play a role in how couples choose to allocate responsibilities.<sup>322</sup> A couple might choose to specialize into breadwinning and caregiving roles not only because the substantive rights and benefits of marriage law encourage it, but also because they have committed to each other that they will function as an integrated family unit for the foreseeable future, and because societal understandings of marriage endorse this choice as permissible and, for many, normatively desirable.

In states where same-sex couples are permitted to actually marry, they, like different-sex couples, gain access to all three aspects of marriage (with the important caveat, discussed above, that they do not enjoy the federal benefits of marriage). In states where same-sex couples are permitted to form civil unions or domestic partnerships, but are not permitted to marry, they achieve the rights and benefits of marriage, and they make the commitment to each other, but they enjoy less of the expressive value. In states that permit neither marriage nor access to a comparable legal status, same-sex couples may nonetheless choose to celebrate their union with a commitment ceremony or private marriage. These couples are consciously making a commitment to each other, but they are not obtaining the legal rights and benefits of marriage (although they may duplicate some of them through private contract law), and they do not obtain the full expressive value of marriage. Studies could be designed that use the existing “laboratory of the states” to better understand the relative significance of the legal, social, and personal aspects of marriage. This too may be a time-limited opportunity. The federal challenge to California’s Proposition 8 may well reach the U.S.

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322. See, e.g., Niko Matouschek & Imran Rasul, *The Economics of the Marriage Contract: Theories and Evidence*, 51 J. LAW & ECON. 59, 63–65 (2008) (collecting studies seeking to evaluate the social, commitment, and signaling-benefits that marriage provides).

Supreme Court. If the Court were to find that California's law was unconstitutional on grounds that invalidated other states' bans, the variation among states would quickly end. Again, as a matter of constitutional law and fundamental fairness, I believe this would be appropriate, but it would foreclose a fruitful line of potential research.

The extent of legal recognition of marriage and derivative benefits is not the only factor that could affect how same-sex versus different-sex married couples divide responsibilities. One of the most important differences may be the rate of childrearing. Although some studies have found that the proportion of lesbian households with children is comparable to the proportion in heterosexual women's households, others report lower rates.<sup>323</sup> And gay male households are less likely to have children.<sup>324</sup> Since specialization among different-sex couples increases dramatically as children enter the equation, and also varies with the number of children a couple is raising, this could be a very significant factor. It would interact dynamically, however, with the advent of marriage rights, especially since many same-sex couples seek to marry precisely to obtain protections for children.

Additionally, as noted above, same-sex marriages are not immune from societal pressures related to gender roles. Engrained gender-based assumptions may put pressure on same-sex couples just as they do on different-sex couples. It could be that on average gay male couples react to these possibilities differently from female lesbian couples. That is, perhaps studies will show that gay male couples will more typically both work full-time jobs and outsource domestic obligations, while lesbian couples will more typically both work part-time jobs and share childcare and domestic responsibilities.<sup>325</sup> Or more strikingly, it could be the opposite.<sup>326</sup> This offers an additional opportunity for analyzing, in a different way, the relative significance of gender compared to marriage in both same-sex and different-sex relationships.<sup>327</sup>

The complex way in which legal marriage interacts with social norms, and the extent that this could affect results, would also need to be

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323. See, e.g., BADGETT, *supra* note 307, at 153–55 (collecting studies).

324. See *id.*

325. Cf. CARRINGTON, *supra* note 300, at 186–87 (discussing relatively young male-couples that rely on the service economy for domestic needs).

326. See Ginia Bellafante, *Two Fathers, with One Happy to Stay at Home*, N.Y. TIMES, Jan. 12, 2004, at A1, A1 (citing research based on census reports that 26% of gay male couples, 25% of different-sex couples, and 22% of lesbian couples include a stay-at-home parent).

327. See also Schacter, *supra* note 17, at 400–01 (making a similar point).



considered.<sup>328</sup> For example, imagine that a study of same-sex married couples in Massachusetts found higher rates of specialization than earlier studies of unmarried same-sex couples. This could support my hypothesis—that is, that legal marriage encourages specialization. Or it could be that those gay couples who choose to marry are, on average, more drawn to a relationship that embraces specialization than the gay population studied before legalization of marriage;<sup>329</sup> in fact, some individuals who were not open about their sexual orientation before legalization of marriage might come out post-legalization. On the other hand, some gay couples who marry might consciously desire to challenge the traditional institution of marriage, or as earlier advocates put it, to “turn the whole institution of marriage upside down;”<sup>330</sup> this could likewise shape behavior but for reasons rather different than the reasons typically thought to explain different-sex couples’ choices. State-based variation could also be important. The experience of couples in Iowa, where the state supreme court decision mandating gay marriage led to a significant backlash and the unseating of several justices,<sup>331</sup> might differ from the experience of couples in Massachusetts, where most reports suggest gay marriage has been relatively uncontroversial and spurred greater acceptance of gay families.<sup>332</sup>

Beyond considerations that relate particularly to legalization of marriage, other factors discussed above, such as race, class, duration of couples’ relationships, biological relationships to children, nature of employment, etc., may all play a role in couples’ decision-making. Despite the complexity posed by such potentially confounding variables, the fact that same-sex marriages now exist in a growing number of jurisdictions offers a significant, and potentially time-limited, opportunity to probe the relative significance of sex, gender, and the law of marriage.

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328. My thanks to Cary Franklin and to Suzanna Walters for conversations that helped me articulate these points.

329. This is a challenge that has long faced researchers studying different-sex couples. *See supra* note 152 and accompanying text. With respect to gay couples, comparisons between states that have legalized marriage and those that have not might be able to correct in part for this.

330. *See* Chambers, *supra* note 229 (quoting Jack Baker, a plaintiff in the first significant same-sex marriage case litigated in this country).

331. *See* A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to the Bench*, N.Y. TIMES, Nov. 3, 2010, at A1.

332. *See, e.g.*, Final Report of the N.J. CIVIL UNION REVIEW COMMISSION, THE LEGAL, MEDICAL, ECONOMIC & SOCIAL CONSEQUENCES OF NEW JERSEY’S CIVIL UNION LAW 20–24 (2008), available at <http://www.nj.gov/oag/dcr/downloads/CURC-Final-Report-.pdf> (discussing positive experience of legalization in Massachusetts and contrasting that to New Jersey’s experience with civil unions).

## CONCLUSION: EQUALITY RECONSIDERED

Current proposals to address the imbalance in caretaking functions provided by men and women during marriage fall generally into two camps.<sup>333</sup> The first camp argues that gender roles are so deeply entrenched in society that we need policies specifically designed (and potentially employing sex-specific requirements) to counter these norms and thus enforce a more equal sharing of responsibility between men and women.<sup>334</sup> The second approach, by contrast, suggests that gender roles are so deeply entrenched, or that they respond to actual biological or physiological differences between men and women, that rather than striving for an “equal” split of household and workplace responsibilities between men and women, we instead need to revalue the feminine contribution and make it easier for women to spend time out of the paid workforce, at least when their children are young.<sup>335</sup> Notably, neither of these common approaches considers the effect that substantive marriage law may play in how couples make decisions.

The marriage equation framework shows how the new reality of marriage rights for same-sex couples offers the opportunity to approach these questions from a fresh perspective. Carefully designed quantitative or qualitative research comparing same-sex and different-sex married couples can play a central role in teasing out the relative importance of sex, gender norms, and the laws and benefits of marriage. It will be many years before researchers have a sufficient body of data and analysis of such data to make credible statements regarding general patterns. That said, broadly speaking, two potential findings could emerge. One is that, notwithstanding marriage, same-sex couples continue to share responsibilities on the home and work front relatively equally. This would suggest that gender is the key factor in different-sex couples’ specialization and that current reform efforts centered on reshaping or accommodating gender norms are the appropriate mechanism to address the ongoing imbalance.

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333. See, e.g., Selmi, *supra* note 226, at 573–74 (summarizing the “two most prominent perspectives”); WILLIAMS, *supra* note 147, at 226–30 (similar).

334. See, e.g., Baker, *supra* note 186, at 385 (suggesting that to claim custody a parent would need to show a pre-existing “significant (defined in terms of time) relationship” with his or her child); Selmi, *supra* note 190, at 712–13, 770–81 (suggesting mandatory paternity leave or rewards for employers that adopt policies that successfully increase paternity leave).

335. See, e.g., Suk, *supra* note 227, at 53 (arguing that if most mothers desire to take a maternity leave, then a “paternalistic” policy that mandates such a leave protects the interests of the majority against “superwomen” who would return to work immediately).

The other potential result is that upon being permitted to marry—particularly if DOMA is repealed or overturned—same-sex couples will move away from sharing responsibilities for children and housework relatively equally and towards specialization. This would suggest that the law and social significance of marriage is comparatively more important than sex or gender in encouraging specialization in couples. Such findings could expose a disconnect in a structure of marriage law that encourages specialization during marriage but that, upon divorce, treats such specialization as an individual choice for which the dependent spouse must bear the consequences. If one embraces a normative ideal of marriage as a partnership in which spouses equally share responsibilities for breadwinning and caretaking, this finding would suggest that reforms should focus on modifying, or, more provocatively, dismantling the substantive law and benefits that flow from marriage itself.<sup>336</sup>

Some might argue, however, that the advent of same-sex marriage also invites reconsideration of the normative vision of equality within marriage. Perhaps, rather than idealizing a marriage in which both spouses equally share breadwinning and caregiving responsibilities, it is appropriate to accept and expect a certain level of specialization in many marriages. This could call for more flexible workplace policies to accommodate caregiving in conjunction with paid work and more robust protections for a spouse who does such caregiving in the event of divorce. In the past, it would have been almost impossible to disaggregate such a statement from gender-based assumptions regarding which spouse would play the caretaking role. And some policymakers and theorists would likely reject such a vision of equality categorically because they assume that it would perpetuate the inferiority and subordination of women. This is a valid concern. Domestic roles are still little valued in our society and are still largely filled by women. However, policies crafted today or in the future to accommodate caregiving within families are necessarily different from the sex-specific responsibilities of wives that they replace. The simple reality of same-sex married couples, as well as the relatively small but growing number of different-sex couples in which it is the husband, rather than the wife, who drops out of or minimizes participation in the paid workplace, changes the story.

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336. See, e.g., FINEMAN, *THE NEUTERED MOTHER*, *supra* note 29 (advocating allocation of state benefits on the basis of caretaker-dependent relationships rather than marital relationships).